UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FINTIV, INC.	)	Docket No. A 19-CA-1238 ADA
	)	
vs.	)	Austin, Texas
	)	
APPLE, INC.	)	April 30, 2021

TRANSCRIPT OF VIDEOCONFERENCE MOTION HEARING
BEFORE THE HONORABLE ALAN D. ALBRIGHT

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13:31:15 THE COURT: Good afternoon, everyone.

13:31:17 MR. RAVEL: Good afternoon, Judge.

13:31:18 MR. WALDROP: Good afternoon, your Honor.

13:31:19 THE COURT: Suzanne, if you're ready to call the case, I'm ready to listen.

13:31:23 THE CLERK: Okay. Motion hearing in Civil Action 1:19-CV-1238, styled, Fintiv, Incorporated vs. Apple, Incorporated.

13:31:33 THE COURT: I'll hear announcements first from plaintiff. Mr. Waldrop, my friend, is there. I'm happy to hear announcements.

13:31:42 MR. WALDROP: Good afternoon, your Honor.

13:31:44 Thank you. This is Jonathan Waldrop on behalf of Plaintiff Fintiv, your Honor. I'm also joined by Texas counsel, Ray Mort, on behalf of Fintiv.

13:31:58 THE COURT: You're a little bit loud, Mr. Waldrop. I don't mean that as a personal matter. I mean it more as a technical matter. You might dial back just a little bit.

13:32:09 Are you going to be doing the speaking for plaintiff, Mr. Waldrop?

13:32:12 MR. WALDROP: Absolutely, your Honor. It's always a privilege and an honor to argue. So I'm excited and absolutely, I'm doing both arguments today, your Honor. Thank you for the opportunity.

13:32:24 THE COURT: Announcements from defense, please.

13:32:26 MR. RAVEL: Your Honor, Steve Ravel for Apple. First and foremost, along with our client representatives today, Jessica Hannah and Natalie Pous, I'll be joined by two colleagues from DLA who are making their first appearance in this case but who need no introduction to this court, John Guaragna and Sean Cunningham. And before we kick off, this is their first appearance in this case, they may want to say hello.

13:32:54 THE COURT: Well, I'm glad you did that because I really like Mr. Cunningham.

13:33:01 MR. GUARAGNA: Thank you, your Honor. We like him, too.

13:33:03 John Guaragna here from DLA Piper on behalf of Apple. We actually have two more colleagues with me, Erin Gibson, your Honor, from DLA Piper is here and as well as Mr. Sean Cunningham. And Mr. Cunningham's going to be doing part of the speaking and the arguing today.

13:33:19 MR. CUNNINGHAM: Your Honor, it's a pleasure.

13:33:20 THE COURT: Mr. Cunningham, are you in San Diego?

13:33:23 MR. CUNNINGHAM: I am actually in Florida right now.

13:33:25 THE COURT: Well, good for you. You get around. So if you all will give me -- literally, I've gotta run and doing something that will take 60 seconds. I'll be

13:33:35 right back and we could take up any issues. I'll be right
13:33:38 back. Okay.
13:34:25 Thanks greatly for that pause. I'm happy to take
13:34:27 up whatever issues we have.
13:34:28 MR. RAVEL: Your Honor, both motions set before
13:34:30 you today are Apple's motions. I'm going to be handling
13:34:35 the 12(c) motion to dismiss, indirect infringement claims.
13:34:38 And Mr. Cunningham is going to talk to you about
13:34:41 infringement contentions. And I'm ready to proceed on the
13:34:47 indirect infringement motion if you are, Judge.
13:34:50 THE COURT: I am, indeed.
13:34:53 MR. RAVEL: All right. As I said, Judge, I will
13:34:55 argue Apple's 12(c) motion aimed at confirming pre-suit
13:35:03 indirect infringement is not in this case. Please note
13:35:05 Apple does not by this motion deal with post-suit indirect
13:35:10 infringement while reserving all rights to deal with that
13:35:12 issue at the appropriate time and in the appropriate
13:35:15 manner.
13:35:17 I should have introduced Mr. Abe Ortega, who is
13:35:21 on slides and graphics today, and I will ask him to share
13:35:25 screen with our slide deck at this time.
13:35:30 Your Honor, this court's decision not to allow
13:35:33 willfulness to be added to this case last September
13:35:38 mandates the results in this motion, in this case today.
13:35:43 I will simply ask you to apply your unbroken line of cases

13:35:48 dealing with indirect infringement to actions you have
13:35:51 taken in this very case previously. Specifically, the
13:35:55 aforementioned willfulness decision. The legal tests are
13:35:58 that similar.
13:36:01 I'm only going to show you this slide once,
13:36:04 Judge, but some advocates would probably just come back to
13:36:07 it like six or eight times. This is your ruling in the
13:36:13 willfulness hearing aimed at the third amended complaint,
13:36:18 which was never filed, for good or for ill. And let's see
13:36:25 what you decided September of last year on an issue that
13:36:29 is guided very much by pre-suit notice.
13:36:33 Not good cause to allow amendment to add
13:36:37 willfulness. You thought it would be futile. And you
13:36:41 understood that Mr. Waldrop may want to take some
13:36:45 discovery after that. And nothing I say about Mr. Waldrop
13:36:49 could ever be critical. It would always be observatory or
13:36:53 even laudatory. He made the decision not to use the 25
13:36:58 extra hours of discovery that this court granted him, over
13:37:04 our mild objection, to develop more pre-suit knowledge
13:37:11 proof. He decided to use it otherwise, which is
13:37:16 absolutely his right.
13:37:17 This is what the Court did. And I'm going to be
13:37:26 arguing for a few minutes that this situation is
13:37:30 indistinguishable from that one. In fact, maybe this is
13:37:33 stronger because, as a technical matter, what we're moving

13:37:38 to dismiss is the second amended complaint because that's
13:37:41 the live complaint that doesn't have any pre-suit
13:37:45 allegations in it. May we have slide 3, please, Mr.
13:37:49 Ortega?
13:37:56 Judge, it's always been a goal of mine to argue a
13:37:59 hearing in front of you in which you were the only judge I
13:38:04 cited, and I'm getting that off of my bucket list today.
13:38:09 You have been writing about indirect infringement and
13:38:14 willfulness -- obviously related because they both have a
13:38:18 requirement of pre-suit knowledge, both of the patent and
13:38:23 of the infringement of it. You've written two long
13:38:27 opinions on it. You've been completely consistent,
13:38:30 beginning with Parity Networks and coming on through
13:38:36 another case I'll mention in a minute.
13:38:38 But let's go over your test. And when I say your
13:38:40 test, I mean your test. For inducement, the plaintiff
13:38:45 knew of the patent and that the induced acts constitute
13:38:48 patent infringement. And on contributory, knowledge
13:38:53 again, sold products especially made for infringing use,
13:39:00 had knowledge of the infringing use, the products had no
13:39:02 substantial non-infringing use, and there exists an
13:39:05 underlying act of direct infringement.
13:39:08 As to contributory, gosh, Judge, this case is
13:39:13 real easy. I mean, are we really taking the position that
13:39:18 iPhone, iPads, Macs and iWatches are designed only to

13:39:25 infringe the 125 patent and don't have any non-infringing
13:39:30 uses? So we've included both of your tests here and let's
13:39:37 go to slide 4, please.
13:39:42 All right. Judge, just to drive home the notion
13:39:46 that you shouldn't decide this motion differently than you
13:39:49 did the willfulness motion, notice the material overlap
13:39:51 between your tests for willfulness and for indirect
13:39:55 infringement. And Fintiv, during the two-and-a-half-year
13:40:00 pendency of this case, has not been able -- my notes said
13:40:04 has utterly failed, but let's say not been able to beat
13:40:07 this court's formulation for indirect infringement.
13:40:11 One more time, Judge. Fintiv's opposition to
13:40:15 this motion is in the nature of a motion for rehearing of
13:40:18 the willfulness ruling that we just went over, and there's
13:40:21 absolutely no reason for the Court to change course nine
13:40:25 months later and nine months closer to trial.
13:40:29 Slide 5, please. Okay. Judge, let's spend a few
13:40:35 minutes and two or three slides on a side-by-side
13:40:38 comparison of the verbiage in the unfiled third amended
13:40:44 complaint and the cases you have written. Fintiv filed
13:40:52 this third amended proposed under seal, so I'm being just
13:40:57 a little bit oblique in how I describe their allegations
13:41:03 so as to honor that request.
13:41:06 But paragraphs 19 to 21 occurred before the 125
13:41:11 patent issued, so they're irrelevant. Allegations

13:41:15 relating to Mozido are not allegations of Apple's
13:41:19 knowledge. And the mere migrating of a lawyer -- or, I'm
13:41:26 sorry, of an employee from SK C&C to Apple doesn't get
13:41:29 within six or twelve degrees of Kevin Bacon of sort of the
13:41:35 direct proof of pre-suit knowledge and pre-suit
13:41:40 infringement that you need.
13:41:42 Judge, we're going to get real specific in a
13:41:45 minute through an exhibit to really close up whether
13:41:53 they've met their pleading burden or not. Slide 6,
13:42:01 please. About a year after Parity Networks, this court,
13:42:06 you, wrote Castlemorton, elements of indirect infringement
13:42:12 stay consistent, two-part test, knowledge of the patent,
13:42:17 knowledge of infringement.
13:42:19 Let's go to page -- to slide 7. Judge, slide 7
13:42:26 is just piling on of more Parity Networks and more
13:42:31 Castlemorton, so I'm going to skip right through it and go
13:42:34 to slide 8. Okay, Judge. The papers in this case contain
13:42:42 a lot of factual detail that the parties offered for very
13:42:45 different reasons. Apple went there for the sole and only
13:42:50 purpose of convincing this court that dismissal of
13:42:53 pre-suit indirect infringement should be with prejudice.
13:42:57 I don't want to put words in my friend, Mr.
13:43:00 Waldrop's mouth, but I think it's a fair bet that he will
13:43:04 rely on all of that back and forth on facts that we think
13:43:10 don't get there to argue that dismissal on the pleadings

13:43:15 is inappropriate. To pre-but that, I have included what I
13:43:22 think, Fintiv may disagree, is the top of the heap of
13:43:26 their knowledge facts -- I don't think they're facts. I
13:43:32 don't think they get there. But if this is the top of the
13:43:36 heap, they haven't gotten there.
13:43:39 Let's dig into slide 8, which I think is the
13:43:44 pinnacle of what they've been able to say. And what Apple
13:43:49 learned from Mozido, at most, is that Mozido had a
13:43:55 managing mobile wallet and it had a patent, one of many,
13:44:02 No. 29, that they described as managing mobile wallet and
13:44:07 related credentials. Not the title, not the number, not
13:44:14 the abstract, not the problem sought to be solved. Judge,
13:44:18 if this is the best they have, and I think it is, the
13:44:21 outcome is clear. Dismissal with prejudice of all
13:44:25 pre-suit indirect infringement claims, both induced and
13:44:31 contributory, is appropriate here today.
13:44:34 Slide 9, please. This is another example of me
13:44:39 being laudatory of Mr. Waldrop because his candor and
13:44:43 transparency in this case has been second to none. I
13:44:49 won't go back to the beginning of the case, but I'll go
13:44:52 back as far as June 2020. By that point, Apple had been
13:45:00 really trying to close the loop on the conclusionary
13:45:05 pleadings of indirect infringement that had been in the
13:45:09 original complaint in 2018 and had been not improved in
13:45:15 the first and the second amended.

13:45:18 And Ms. Frost and Mr. Waldrop had a colloquy in
13:45:24 front of you where a defense lawyer of -- was trying to
13:45:31 close the loop on something, and Mr. Waldrop candidly
13:45:37 said, we're not aware of any direct communications between
13:45:41 Fintiv and Apple prior to the filing of the complaint. He
13:45:46 has stuck by that, he's never changed that.
13:45:51 Slide 10, please. The Court made sure he heard
13:45:58 Mr. Waldrop correctly and confirmed, don't have any
13:46:03 evidence of direct or indirect at this time. That's
13:46:08 correct. Slide 11, please. And, Judge, you confirmed
13:46:13 that Mr. Waldrop had understood you, too. As the trial
13:46:19 lawyer that you are, you said, this may come up at trial.
13:46:23 When they try to put something in, you would be able to
13:46:26 stand up and say, Judge, on June 8th, they've made that
13:46:31 representation to me and I think that is sufficient. I
13:46:37 think given that colloquy, I think we know where we are.
13:46:42 You could not have been more clear.
13:46:46 Judge, Apple is giving Fintiv the benefit of
13:46:52 every procedural doubt here. Notice this is a motion to
13:46:56 dismiss plaintiff's second amended complaint, which pleads
13:46:58 -- it's their live one. That third one never was filed.
13:47:03 Their right, their choice.
13:47:05 The live complaint, which is unchanged from
13:47:08 December of 2018, pleads neither pre-suit knowledge nor
13:47:14 pre-suit infringement. After this court denied Plaintiff

13:47:23 Fintiv's attempt to add willfulness by a third amended
13:47:27 complaint, that complaint would never be -- had never been
13:47:31 filed. And I guess we'd be within our rights to say, all
13:47:35 we were shooting at was the second amended, but again, we
13:47:39 want to bend over backwards to put things in the best
13:47:42 procedural light for Fintiv argue, not surprisingly, that
13:47:49 what you already did on willfulness should carry the day
13:47:54 today. Let's go to slide 12, please.
13:48:00 Okay, Judge. Four points to wrap up, quicker
13:48:05 than usual but probably not quick enough. The September
13:48:10 1st, 2020 conclusion controls. The challenged complaint,
13:48:17 the second, contains no indirect infringement facts.
13:48:20 Fintiv can't argue it wasn't afforded ample opportunity to
13:48:26 develop indirect infringement facts and didn't even use --
13:48:29 elect to use all the discovery it was offered. And,
13:48:35 Judge, you've been writing on indirect infringement for
13:48:38 almost two years now, and you have never wavered from your
13:48:45 course that is fatal to Fintiv's plight here today, its
13:48:51 argument here today.
13:48:52 I'll sit down unless the Court has questions.
13:48:55 And we can turn the screen over to Fintiv's side.
13:49:02 THE COURT: Very good.
13:49:03 Mr. Waldrop.
13:49:04 MR. WALDROP: Yes, your Honor. Permit me to
13:49:06 share my screen, your Honor. Can you see it, your Honor?

13:49:29 Are you able to see the slide presentation, your Honor?

13:49:31 THE COURT: (Indicating affirmatively.)

13:49:34 MR. RAVEL: Judge, I'm just going to note for the record. We're not going to make a big deal out of this, but this is the first we're seeing this and we'll try to muddle through.

13:49:42 THE COURT: Okay. Mr. Waldrop, I can see them.

13:49:46 MR. WALDROP: Okay. Thank you, your Honor. And, Steve, I thought that we had sent them over. My apologies for that. Thank you, your Honor.

13:49:53 May it please the Court, my name is John Waldrop, and I represent the Plaintiff Fintiv in this case.

13:50:02 Apple's motion for judgment on the pleadings should be denied. This is a case in which evidence to preclude evidence -- hold on one second, your Honor. Can you hear me fine, your Honor? Is my audio okay?

13:50:19 THE COURT: I'm getting a little feedback. Lily, are you okay?

13:50:19 COURT REPORTER: (Indicating affirmatively.)

13:50:33 MR. WALDROP: This is a case, your Honor, in which the evidence as to preclude Apple's 12(c) motion regarding Apple's knowledge of the 125 patent prior to the filing of the complaint has been adduced a substantial faction in this case, your Honor. Since July 14, 2020, almost 10 months ago, your Honor, it is undisputed that

13:50:54 Fintiv has adduced evidence of Apple's notice of the 125
13:51:00 for this case. In fact, your Honor, Fintiv moves to amend
13:51:03 its complaint to add a willfulness claim, citing this very
13:51:06 evidence.
13:51:06 Apple opposed that motion successfully but
13:51:09 notably, did not move to dismiss Fintiv's indirect
13:51:12 infringement claims at that time. And as the Court is
13:51:15 well aware, 12(c) motions are intended to dispose of
13:51:19 issues where material facts are not in dispute, and
13:51:23 judgment on the merits is appropriate on the substance of
13:51:26 the pleadings. However, when the evidence is viewed most
13:51:29 favorably to the plaintiff, Apple's motion should be
13:51:32 denied.
13:51:33 Now, your Honor, it is rare, your Honor, that you
13:51:36 have a case in which the single piece of evidence that Mr.
13:51:42 Ravel spent a lot of time on didn't have a meeting between
13:51:45 the plaintiff and the defendant in which the plaintiff
13:51:48 presents his entire portfolio, including the patent that
13:51:52 is being litigated over, in an offer to license and an
13:51:56 offer in which to collaborate. That is by definition,
13:52:00 your Honor, evidence of notice. Now, I understand Mr.
13:52:03 Ravel's points and I'll go into them very clearly, your
13:52:06 Honor.
13:52:06 But what struck me from his presentation, apart
13:52:09 from the very nice things he said about me, which I

13:52:11 appreciate very much in terms of my candor, was -- and
13:52:14 I'll be candid here, your Honor -- how much of his
13:52:16 argument sounded like a summary judgment motion and how
13:52:19 much of his argument turned on his recitation at spinning
13:52:23 the facts in such a way that we believe a trier of fact,
13:52:26 when looking at that piece of evidence that he spent a lot
13:52:28 of time on and that I will spend a little bit more time
13:52:32 on, could lead to a different conclusion that Apple did
13:52:35 have notice. And this feels like a summary judgment
13:52:37 argument and which you're making credibility
13:52:40 determinations and characterizations of evidence to get to
13:52:43 a conclusion to his favor. We take a different view, your
13:52:46 Honor.
13:52:46 So that is how -- so Fintiv can lay out the
13:52:51 table, your Honor, I have a slide presentation that goes
13:52:53 into more in depth regarding what happened in this case.
13:52:56 The uniqueness of it in the sense of everything's on the
13:52:58 table. All of these facts are in the record and they have
13:53:02 been developed, and they're in the record and there is
13:53:05 notice has been sufficiently provided almost ten months
13:53:09 ago.
13:53:09 But before I move forward with my presentation, I
13:53:12 wanted to ask the Court if it had any questions before I
13:53:15 moved forward. Your Honor, I assume you have no
13:53:28 questions, so I will keep going.

13:53:30 THE COURT: Sorry. I didn't understand that you
13:53:32 wanted me -- yes. I'm good.
13:53:34 MR. WALDROP: Okay. Good, your Honor.
13:53:35 So, your Honor, going to slide 2 -- we just have
13:53:38 a few slides, your Honor, that discuss the standard, your
13:53:41 Honor, and this is appropriate.
13:53:42 THE COURT: Mr. Waldrop, you can skip the -- this
13:53:46 isn't my first Rule 12 motion.
13:53:50 MR. WALDROP: Yes, your Honor.
13:53:51 So, your Honor, that leads to slide 5, your
13:53:54 Honor, which is where I ended and I'll take back up is,
13:53:58 what we have before us is a 12(c) motion that should be
13:54:01 converted to a Rule 56 motion for summary judgment, and
13:54:04 that is because Apple has presented materials outside the
13:54:07 pleadings in support of its motion, as has Fintiv. And
13:54:12 the foregoing analysis of those materials, there are
13:54:16 factual disputes as to what they mean and what they would
13:54:18 constitute to a trier of fact, your Honor.
13:54:20 In fact, your Honor, going to slide 6, in its
13:54:24 motion, your Honor, in its 12(c) motion, Apple attaches 11
13:54:29 exhibits consisting of deposition transcript excerpts and
13:54:31 discovery responses, but it seeks to rely on these
13:54:35 documents to show that Apple did not have pre-suit notice
13:54:38 of the 125 patent, your Honor. And this evidence they say
13:54:42 is only for the purposes of the futility section so it

should not be considered as part of -- outside of the record for purposes of 12(c), but as we saw from Mr. Ravel's 12 argument, which was nicely done, that he talked a lot of about evidence that was presented to this court ten months ago and is outside the pleadings in this case but we believe part of record in which Fintiv did legitimately try to insert into the record. And I'll come back to that later, your Honor.

Moving to slide 7, your Honor, we also attached these same exhibits and had previously done so in our motion to file the third amended complaint, which I'll get back to the timing of that. Both parties set forth competing versions of the events that happened. But this is not a matter appropriate for a judgment on the pleadings. This is a matter appropriate for summary judgment that we think the parties have material disputes as to what happened during these meetings and exchanges with Apple and Fintiv.

Now, going to slide 8, your Honor, I set forth the facts that we've put in our motion to amend the third amended complaint. Your Honor, we set forth facts, one, that Apple hired one of SK C&C's employees, which is a company that was acquired by Fintiv, which developed the 125 patent technology, and that he was aware of the 125 patent.

13:56:13 But, more importantly, your Honor, we've learned
13:56:16 of meetings between David Luther, who is an employee of
13:56:21 Fintiv, and an Apple employee, named David Parker, at the
13:56:26 Money 20/20 conference in 2020 in which they specifically
13:56:28 discussed licensing of Fintiv's portfolio, including the
13:56:34 125 patent. Now, I know Mr. Ravel made much hay regarding
13:56:37 my statements of June 8, 2020, your Honor, and I believe I
13:56:41 have described those earlier and I will do so again.
13:56:45 On June 8, 2020, when I made that representation
13:56:48 to the Court that we were unaware of facts regarding
13:56:51 pre-suit knowledge, your Honor, you have -- the context
13:56:55 was that Apple had been banging on the table for many
13:56:58 months, even though we had reiterated this statement and
13:57:03 meet-and-confers and in our discovery responses, and it
13:57:05 led me to believe why are they so focused on this? And we
13:57:08 went back to our client and say, look, you know, we've
13:57:11 said this over and over again, is there something that
13:57:13 we're missing? Is there something that we need to
13:57:16 investigate further? Because Apple has, you know, made me
13:57:20 stand in a court proceeding and be very definitive, and
13:57:24 that led me to investigate further and to try to determine
13:57:27 exactly what was this really all about.
13:57:29 And what we found out was, some of the facts laid
13:57:35 here before and as soon as we found those out, within two
13:57:37 weeks of that hearing on June 8th, we moved expeditiously

13:57:41 to move to a third -- to amend the complaint to add this
13:57:44 information, your Honor, in which, frankly, your Honor,
13:57:46 was in Apple's possession, custody and control because
13:57:49 this same employee, Mr. Parker is still at Apple today and
13:57:53 was available for counsel to investigate and interview,
13:57:58 and they disclosed none of this in their interrogatory
13:58:01 responses or in any other meet-and-confers that we had.
13:58:05 And so, as soon as we -- go ahead. I'm sorry.
13:58:07 THE COURT: Mr. --
13:58:08 MR. WALDROP: Yes.
13:58:10 THE COURT: Were either Mr. Luther or Mr. Parker
13:58:13 deposed?
13:58:14 MR. WALDROP: Mr. Luther was deposed, your Honor.
13:58:16 And on slide 9 and slide 10, I put forth some of the
13:58:21 information that was elicited from Mr. Luther during his
13:58:24 deposition. Yes.
13:58:25 THE COURT: Why don't you jump to that, and then,
13:58:26 I'm going to have Mr. Ravel respond.
13:58:30 MR. WALDROP: So yes, your Honor.
13:58:30 On slide 9, I set forth some excerpted deposition
13:58:36 testimony which Mr. Luther testified that in November
13:58:40 2015, at the Money 20/20 conference, he met with Mr.
13:58:43 Parker. He was in business development for Apple, and
13:58:47 they had discussions around significant meetings and
13:58:50 collaborations regarding Mozido, which is now Fintiv, and

13:58:54 a collaboration. That excerpted testimony is on slide 9.

13:58:58 On slide 10, your Honor, we had a further in

13:59:01 which Mr. Luther was asked by Apple's counsel, what did

13:59:04 you tell Mr. Parker that Apple -- that Mozido could do for

13:59:07 Apple at that meeting? And he goes forth and he sets

13:59:11 forth that we had discussions similar with them than we

13:59:13 had with Samsung regarding our customer service managers

13:59:18 and we do NFC technology for customers. So in the

13:59:22 payments area, we were talking about how we could

13:59:24 complement them with our trusted service and identity

13:59:27 manager. Some of the same terms and concepts at issue in

13:59:31 this very case.

13:59:32 On slide 11, your Honor, he goes further, and

13:59:34 Apple's counsel asked him: What did you understand Mr.

13:59:36 Parker's role or position was at Apple when you had this

13:59:39 meeting with him? Mr. Luther responds, my understanding

13:59:41 was, he was doing business development, and he was helping

13:59:44 to prioritize and roll out Apple Pay in various regions

13:59:49 around the world. Apple Pay, which is the very technology

13:59:52 at issue in this case. That's from his trial transcript,

13:59:55 your Honor, excerpted.

13:59:56 Moreover, your Honor, on slide 12, this was one

14:00:01 of the exhibits that was discussed by Mr. Luther in terms

14:00:05 of a slide deck regarding the 125 patent to Apple. It was

14:00:10 a slide presentation from July 2016, which has on the left

14:00:15 and is excerpted a listing of the 94 patent specifications
14:00:19 that were in Fintiv's ownership. The 29th item is the
14:00:26 managing mobile wallet and related credentials, which
14:00:28 corresponds to the 125 patent, your Honor, a system and
14:00:31 method for managing mobile wallet and its related
14:00:33 credentials. That was the patent disclosed. It was part
14:00:37 of a larger portfolio that has been offered to Apple.
14:00:41 Your Honor, I'll stop there. I have more. But
14:00:43 your Honor, this was all disclosed in deposition testimony
14:00:47 many, many months ago, many weeks ago. And this kind of
14:00:51 evidence you don't regularly see in cases, I think it is
14:00:55 highly material and relevant to their notice of the 125
14:00:57 patent. I could stop here, your Honor.
14:00:58 THE COURT: I missed the connection where the 125
14:01:04 patent was communicated to anyone at Apple.
14:01:08 MR. WALDROP: I'm sorry, your Honor. I'll go
14:01:10 back to that.
14:01:10 Mr. Luther presented a slide deck presentation.
14:01:14 THE COURT: Okay.
14:01:15 MR. WALDROP: To Mr. Parker and in that slide
14:01:18 presentation was a listing of all of the patents in
14:01:23 Mozido's portfolio, which they were offering for license
14:01:25 and collaboration with Apple. And included in that
14:01:28 listing of patents was the 29 -- was the 125 patent. And
14:01:32 so, on slide 12, which is showing you an excerpt from that

14:01:36 presentation where on the left side is the name of the 125
14:01:40 patent, which is part of those specifications, and on the
14:01:43 right side, we've given you the corresponding title to 125
14:01:46 is how they match up.
14:01:48 So yes, your Honor. It was delivered to them in
14:01:50 a presentation that was e-mailed to them, your Honor.
14:01:52 THE COURT: Was what I'm looking at one slide
14:01:56 where it showed managing mobile wallet on one side and the
14:02:02 125 patent on the other? That's what I'm not following.
14:02:05 MR. WALDROP: No, your Honor.
14:02:05 What was in the presentation was what's on the
14:02:08 left, which is excerpted, which was a listing of the 94
14:02:11 patent specifications that Fintiv or Mozido owned. What
14:02:16 we've done for the Court's edification is to match that up
14:02:18 with the title of the 125 on the slide.
14:02:21 THE COURT: And you're saying there will be a
14:02:24 witness at trial who will testify that in 2016, in July of
14:02:33 2016, someone directly communicated to someone at Apple
14:02:39 that you were in possession and attempting to license the
14:02:45 125 patent.
14:02:48 MR. WALDROP: Yes, your Honor. In addition to
14:02:49 any other patent that Apple would have been willing to
14:02:52 collaborate with Fintiv on. Yes, your Honor.
14:02:53 THE COURT: Okay. Mr. Ravel. Mr. Ravel, you're
14:03:02 on mute.

14:03:04 MR. RAVEL: Mr. Waldrop, will you leave that
14:03:06 slide up for the first part of my rebuttal argument?
14:03:10 MR. WALDROP: Absolutely. Anything for you,
14:03:11 Steve. Absolutely.
14:03:13 MR. RAVEL: Well, you know, Judge, I'm
14:03:15 remarkably --
14:03:16 THE COURT: Mr. Ravel, I think you need to pull
14:03:18 your mic down because I can't hear you.
14:03:21 MR. RAVEL: How's this, Judge?
14:03:23 THE COURT: Much better. Thank you.
14:03:25 MR. RAVEL: I'm remarkably regrettable of all
14:03:28 those nice things that I said about Mr. Waldrop in my
14:03:33 opening argument.
14:03:34 THE COURT: I say nice things about you all the
14:03:36 time and I never regret it.
14:03:38 MR. RAVEL: Okay. Well, let me put it in a
14:03:39 different way, Judge. I'm not the least bit regretful of
14:03:42 all the nice things I said about Mr. Waldrop, but that
14:03:44 doesn't mean that this responsive argument could be any
14:03:50 more wrong.
14:03:53 First of all, there's a little -- there's a lot
14:03:57 of spin going on here. And you asked the question that I
14:03:59 would have asked and that is, is this a single slide? No.
14:04:05 Notice what I said about line item 29. Candidly, I put it
14:04:12 before you that Mozido told somebody at Apple and it was

14:04:18 argued to you back on the willfulness hearing. And, you
14:04:23 know, Judge, that's the one day that I was sick since you
14:04:26 went on the bench, and I so regret -- really do regret
14:04:30 missing that hearing. But it gave me the opportunity to
14:04:34 review what happened there afresh. So it is brand new to
14:04:40 me.
14:04:43 And let me say, remember what I said to you in my
14:04:45 opening argument that somebody at Mozido told somebody at
14:04:50 Apple, and at the willfulness hearing, the cases that say
14:04:56 one of 10, 15, 20, 25,000 employees having some little
14:05:03 piece of circumstantial evidence is not imputed to Apple,
14:05:08 but taking what Apple actually saw at its face and taking
14:05:15 it as true, somebody at Apple was told that Mozido had a
14:05:23 patent about managing mobile wallet and related
14:05:27 credentials. Nothing more. No abstract. No description.
14:05:35 No discussion of the problem sought to be solved.
14:05:46 So let's take slide 16 as true, which is what I
14:05:52 want you to do or I wouldn't have put it before you
14:05:55 myself. And let's take everything that Mr. Waldrop said
14:06:02 in his presentation today as true. None of that is in any
14:06:11 complaint. And I take a little umbrage to how we could
14:06:16 have filed a 12(b)(6) or 12(c) motion trying to get rid of
14:06:25 indirect infringement from a case -- from a pleading that
14:06:28 was never filed. Who would do that? Why would you
14:06:30 consider it?

14:06:31 The procedural posture was, they filed a motion
14:06:35 to amend. We opposed it successfully full stop. We
14:06:44 brought this to the Court's attention by filing a 12(c)
14:06:47 motion to dismiss their live complaint, and we've said
14:06:50 we'll give them the benefit of every doubt and take as
14:06:54 true the provisions of the third amended complaint that I
14:07:00 went over with you, and that takes us right back to a
14:07:07 traditional 12(b), 12(c) situation. Who could be more
14:07:13 bent over backward for them?
14:07:17 We take pleadings, facts from an unfiled
14:07:22 complaint, take them on in front of you, we for these
14:07:26 purposes only -- for today only, let's stipulate that all
14:07:31 that stuff that he said, which was far short of knowledge
14:07:37 of the patent or knowledge of infringement is true. Let's
14:07:41 take me at my word that the reason we got down in the
14:07:47 weeds on all of that he said, she said was to show how
14:07:55 much they had been allowed to dig for what they never did
14:07:58 get to, which was knowledge of the patent and knowledge of
14:08:01 infringement, and again, stipulating for today only.
14:08:08 Don't consider anything we said outside of the four
14:08:12 corners of their unfiled pleading. Decide this just like
14:08:17 a 12(b)(6) or a 12(c), and if you do that, the actual
14:08:24 pleadings as opposed to the outside stuff that I went over
14:08:26 with you doesn't get there. The left half of his slide
14:08:31 12, which was the only thing anybody at Apple ever saw,

14:08:35 doesn't get there.

14:08:38 So with all due respect, I just don't think
14:08:40 they've laid a hand on the core argument that based on
14:08:43 their filed and unfiled pleading, four corners, they have
14:08:47 not followed this court's test about how to get any
14:08:51 further than the pleadings on the issue of pre-suit
14:08:55 indirect infringement.

14:09:00 THE COURT: Mr. Waldrop, you can both respond to
14:09:03 Mr. Ravel and, of course, continue with anything else you
14:09:06 want to say in response overall to the argument on 12(c).

14:09:11 MR. WALDROP: Thank you, your Honor.

14:09:12 You know -- thank you, Steve. You know, I always
14:09:16 appreciate Steve, you know, complimenting me. But I have
14:09:19 to set the table a little bit more for things that are
14:09:23 left out, which are important.

14:09:26 One, your Honor, I just want to give the Court
14:09:28 context that Mr. Luther who Apple deposed, this very
14:09:32 witness that they went and deposed and asked questions
14:09:34 about this because they wanted to know and we presented
14:09:37 him, he was a former employee that we had to find. He had
14:09:41 left the company, and he was someone that we had to go
14:09:43 digging and find to get this information, and we wanted to
14:09:48 do it after that June 18. So I wanted to let the Court
14:09:50 know, just being as candid as I can be, that is what
14:09:54 happened.

14:09:54 Second, your Honor, the motion to amend, your
14:09:59 Honor, was done -- set forth and done to add these facts
14:10:04 regarding willfulness, but they also bear on indirect
14:10:08 infringement, your Honor. And at most, your Honor, what
14:10:12 we're talking about is in previous cases where you have
14:10:16 decided this, you have dismissed indirect infringement
14:10:19 claims, similar to what was stated in our second amended
14:10:22 complaint, but you have always allowed the parties during
14:10:25 the course of discovery to seek out information that can
14:10:28 be added to the complaint.
14:10:29 Your Honor, I don't think anyone disputes that
14:10:32 this information is fully in Apple's possession and fully
14:10:36 in Apple's notice area, your Honor. And at most we're
14:10:39 talking about is -- Mr. Ravel talks about with respect to
14:10:42 procedure, whether or not this should be added to the
14:10:44 complaint, your Honor. I don't think it's necessary, your
14:10:47 Honor, because it's in the case. Their witnesses have
14:10:51 been deposed about this. And a witness is going to come
14:10:54 to trial, you know, and testify that there were meetings
14:11:00 with Apple about licensing not only this patent but the
14:11:02 entire portfolio of -- in Fintiv's possession, your Honor.
14:11:06 Those are just the facts and that they were very excited
14:11:09 about the opportunity to collaborate with Apple.
14:11:11 THE COURT: Mr. Luther is going to come and say
14:11:14 that?

14:11:15 MR. WALDROP: Yes, your Honor.

14:11:16 THE COURT: Mr. Ravel.

14:11:20 MR. RAVEL: Judge, none of this stuff is pled. The things that Mr. Waldrop brought to your attention are far short of how he's describing them. I don't see any pleading or any evidence that Apple and Mozido talked about licensing this whole portfolio, or that the person from Apple was anything other than a flunkee or a function -- or a, you know, not able to bind the company.

14:12:02 And I think we really need to be real clear here, Judge. Nothing -- how can this be a moving target? I mean, how can --

14:12:13 THE COURT: Mr. Ravel, let me say -- get back to that. Here's -- put yourself in my shoes. I have Mr. Waldrop, who is representing that Mr. Luther is -- I'm leaving aside whether it's been pled or not but for the purposes of this. Mr. Waldrop is representing to me that a witness is going to come and testify that he gave -- identified a list of patents to a representative of Apple in 2016, in discussions with regard to Apple taking a license.

14:12:57 Here's my question is, are you saying that that evidence does not exist or won't exist?

14:13:11 MR. RAVEL: Judge, I'm not willing to spin for you what evidence may come in or not, but I am willing to

say that that conclusion that there was a discussion about licensing is not in the pleadings, and it's not in what Mr. Waldrop decided to show you today in terms of proof.

If Chief Justice Roberts was in Mr. Waldrop's shoes and he came down off the bench and was an advocate for a while, it would not be appropriate for a representation of counsel, Justice Roberts, Mr. Waldrop, which is not borne out by either pleading direct or circumstantial evidence to be considered, frankly. No matter how honest he is, it's not enough.

THE COURT: Then let me ask Mr. Waldrop. Mr. Waldrop, I want you to tell me specifically where in the record Mr. Luther has either -- has given an affidavit or an interrogatory answer or in deposition testimony, Mr. Luther has said, I had discussions with Apple that included the licensing of the -- specifically of the 125 patent. Where will I find that in the record?

MR. WALDROP: What you would find in the record, your Honor, is the excerpts that I provided in slides 8 and slides 9 through 11 in which Mr. Luther discussed with Apple's representative about working at an NFC and rolling out Apple Pay and working with Apple and that -- and then, you will find in his deposition testimony that I could get that's not cited here where he implicated that he provided a slide presentation. So that's on slide 12, your Honor,

of slides -- so slide 12.

THE COURT: Slide 12 doesn't have the 125 patent. You've added the 125 patent, but it doesn't have -- you've added the 125 patent to what he actually showed, but that didn't have it. So tell me anywhere there's evidence where Mr. Luther informed Apple of 125 patent, not just of the 125 patent but in the context of asking Apple had any interest in taking a license to it.

That is your -- that is what you have to show me exists if you want to keep this in the case.

MR. WALDROP: Your Honor, let me make sure that I answer your question directly. What we have evidence of is Mr. Luther on the -- on slide 12 at 214, 8 through 11, disclosed that he sent to Apple a listing of all the patents that Fintiv owned at that time, and it included the 125. He did not specifically discuss the 125 with them during those discussions in terms of -- but he provided them with a listing all the patents and the titles of the patents. And what we have shown you is what he would testify is item No. 29, right, that's on slide 12 -- and let me put that back up, your Honor. On slide 12. He will testify that item 29 corresponds to the 125 patent that was in the presentation that he gave to Apple.

Was there a specific discussion about the 125 that is in this case? No. But he is indicating that item

14:17:16 29 is the 125 patent. That is what he said at his
14:17:21 deposition and that is what he will say at trial, and that
14:17:23 was part of the package of items and IP that was available
14:17:27 for Apple to license, acquire or collaborate on. That is
14:17:30 what is in the --
14:17:33 THE COURT: Now, address Mr. Ravel's concern that
14:17:35 none of this is in your -- is in any complaint.
14:17:42 MR. WALDROP: Well, first of all, your Honor, we
14:17:44 attempted to, one, provide a lot of this information in
14:17:49 the third amended complaint. That was denied. Second,
14:17:52 your Honor, as you know, in deposition and discovery, your
14:17:55 Honor, you don't have to update your complaint with all
14:17:57 the information that's adduced during discovery. Rule 26
14:18:01 says you only have to do that if the party's not aware of
14:18:05 it, your Honor.
14:18:06 And Apple was amply aware of these meetings
14:18:09 through our pleadings and through the very knowledge of
14:18:12 the employees who are still at Apple, including Mr.
14:18:15 Parker. So that's what I would say about that, your
14:18:17 Honor.
14:18:17 Third, your Honor, I would say, this court has
14:18:19 routinely allowed the parties to conform the complaint to
14:18:24 the evidence that's already in the case. We're not
14:18:26 talking about information that is unknown or new. This is
14:18:30 information that's been known for almost ten months.

14:18:34 What's really going on, your Honor, is there is, at most,
14:18:37 a technical violation.
14:18:38 And I understand that, your Honor, but, your
14:18:41 Honor, from our perspective, there has been notice here.
14:18:46 It's in the case, it's been fought over. There are
14:18:48 disputes about what it means. And what I would like to
14:18:50 point the Court to is, Mr. Ravel has never -- doesn't say
14:18:53 that this didn't happen. Mr. Ravel's not going to say to
14:18:56 you: No. That meeting never happened with Mr. Parker.
14:18:58 Or we never got this presentation.
14:19:00 What they're arguing about is, what does it
14:19:02 really mean? And we have facts -- I'll stop here. Go
14:19:06 ahead.
14:19:06 THE COURT: Mr. Waldrop, other than Mr. Luther,
14:19:09 is there any other evidence that you have of indirect
14:19:14 infringe -- I'm sorry, of not notice to Apple prior to the
14:19:19 date you filed suit?
14:19:24 MR. WALDROP: Mr. Luther and their additional
14:19:26 witnesses who were at the meeting in Money 20/20, the
14:19:30 Money 20/20 conference, there is other witnesses who were
14:19:33 at that meeting that Mr. Parker where they were discussing
14:19:35 some licensing methods. But this is what's in issue -- go
14:19:39 ahead.
14:19:39 THE COURT: I thought it was in 2016, not 2020.
14:19:43 Am I missing dates?

14:19:45 MR. WALDROP: I'm sorry, your Honor. Let me be
14:19:46 clear. In 2015, they met at a conference and there were
14:19:51 discussions there at the conference, and then, subsequent
14:19:54 months later, this is where there was ongoing activity in
14:19:57 which this presentation was provided afterward. So there
14:20:00 was a meeting at the conference, initial excitement about
14:20:02 the opportunity of working together, and then, it
14:20:05 continued down between the parties in which further
14:20:08 information was presented to Apple. So it stretched over
14:20:10 a course of months, your Honor.
14:20:15 THE COURT: Who were the other witnesses?
14:20:19 MR. WALDROP: The other witnesses include Mike
14:20:21 Love and Mr. Luther and Charlie Wigs, I think, was also at
14:20:28 that meeting. But it was at least Mr. Mike Love was
14:20:30 there, as well. There were multiple Mozido witnesses who
14:20:32 met Mr. Parker at the Money 20/20 conference in 2015.
14:20:36 THE COURT: Is Mr. Love going to testify at
14:20:38 trial?
14:20:39 MR. WALDROP: Yes, your Honor. He is the
14:20:40 corporate rep.
14:20:41 THE COURT: Okay. Do you have anything else you
14:20:43 want to say on this issue?
14:20:47 MR. WALDROP: No, your Honor. Unless you have --
14:20:49 unless you have specific questions. The only thing --
14:20:52 there was only one thing that I wanted to make sure that I

14:20:55 address any questions you had before. The last thing that
14:20:57 I wanted to say, your Honor.
14:20:59 THE COURT: Go ahead, please.
14:21:01 MR. WALDROP: And if I could go to slide -- this
14:21:05 is at slide 16, your Honor. This just goes to the point,
14:21:10 your Honor, that Fintiv should be granted leave if that's
14:21:13 still an issue, your Honor, for the Court in terms of this
14:21:16 pleading issue, to add these facts that are already in the
14:21:19 record, limit it to only those facts that have been
14:21:21 discussed before, followed out by the parties, that that
14:21:25 is a -- that is something in the alternative that we seek,
14:21:28 your Honor.
14:21:28 And the last thing that I would add, your Honor,
14:21:30 is the colloquy back and forth between Mr. Ravel to me
14:21:36 just only highlights how this information is highly
14:21:40 relevant to a trier of fact. How people of different
14:21:44 views could come to different conclusions about what Apple
14:21:46 knew and what Apple did not know or could have known. And
14:21:50 moreover, your Honor, like I said before, there's rarely
14:21:53 you have cases like this where the parties are talking
14:21:57 about licensing both in person and in conversations
14:21:59 continuing after where there's still the same -- where the
14:22:04 people involved are still with the same company and
14:22:07 involve the same technology that we're finding here. This
14:22:09 is rare evidence, your Honor. This is highly material and

14:22:12 I think would be relevant to a trier of fact. And with
14:22:15 that, your Honor, I'll conclude.
14:22:18 MR. RAVEL: May I be heard briefly, your Honor?
14:22:20 THE COURT: Mr. Ravel.
14:22:22 MR. RAVEL: Yeah, Mr. Waldrop, to save time,
14:22:24 would you go back to your slide 12, rather than having me
14:22:28 bring up mine that's got the same -- one of the same
14:22:30 pictures in it?
14:22:32 MR. WALDROP: I am your servant, Mr. Ravel. I'll
14:22:35 get back there very quickly. Slide 12. I'm there.
14:22:39 MR. RAVEL: Okay. First of all, did Mr. Waldrop
14:22:42 really think he was really going to be able to bait me to
14:22:45 step into that trap of saying what happened and what
14:22:48 didn't happen when I was here on a 12(b) or a 12(c)
14:22:52 motion? Not a chance.
14:22:54 Judge, 30-odd months into this case, outside of a
14:23:03 pleading, we have one line on a piece of paper that says
14:23:13 Mozido told Apple it had a patent that covered managing
14:23:19 mobile wallet and related credentials. That is not notice
14:23:28 of -- in the context of 40, that's not notice of the
14:23:31 patent. It's clearly not notice of infringement of the
14:23:34 patent. It's certainly not notice under contributory that
14:23:43 iPhone, iWatch, Mac and iPad only exist to infringe the
14:23:50 125 patent. It's just not enough, Judge.
14:23:54 Again, for today only, only today, let's

14:24:01 stipulate that line 29 was in the live pleading.
14:24:06 Everything that I said and argued is still accurate, is
14:24:11 not enough under this court's test, and this court is
14:24:15 really clear. It says, I will let you have a reasonable
14:24:20 time into discovery to put the best face on it you can.
14:24:25 And if this is the best face they can put on it, taken
14:24:31 pre-suit, indirect infringement at this case right now is
14:24:35 what the Court should do.
14:24:40 THE COURT: Mr. Waldrop, anything else before we
14:24:41 move to the next issue?
14:24:46 MR. WALDROP: The only thing I would add is, your
14:24:48 Honor, you know, look, like I said, I think this is the
14:24:50 kind of evidence you always want. I think that if when
14:24:53 you were practicing, when anybody is practicing, they
14:24:55 would want to know this information. It's highly
14:24:57 relevant, your Honor. And with that, I'll conclude, your
14:25:00 Honor. And the jury should decide.
14:25:02 THE COURT: Mr. Ravel, what's the next issue?
14:25:05 MR. RAVEL: Mr. Cunningham is going to have a
14:25:07 discussion with you about the status of Fintiv's
14:25:11 infringement contentions. I'll turn the baton over to
14:25:15 him.
14:25:15 THE COURT: Okay.
14:25:17 MR. CUNNINGHAM: May it please the Court, your
14:25:19 Honor, and good afternoon again.

14:25:21 I want to start by saying how happy I am, in
14:25:24 particular, and our firm is to be involved in this case
14:25:26 now. And I'm very much looking forward to being
14:25:30 physically in your courtroom at some point in time. So
14:25:34 thanks for having us today.
14:25:35 Your Honor, I have a little bit of bad news and
14:25:40 that is that I don't have slides, so unfortunately, you're
14:25:43 going to have to look at me while I do this.
14:25:48 THE COURT: How about we do -- how about we let
14:25:49 Mr. Waldrop put up one of his slides?
14:25:55 MR. WALDROP: I will do it. I will do it.
14:25:58 MR. CUNNINGHAM: So, your Honor, I think this
14:26:01 motion is actually fairly simple. And when I came in in
14:26:05 cold and read the motion, I immediately saw that it sort
14:26:09 of divides into two buckets of information. Bucket number
14:26:13 one are infringement theories that were put forward for
14:26:18 the first time in these September 2020 infringement
14:26:22 contentions. And that was the fifth set of infringement
14:26:25 contentions. I think we're now up to set No. 7. But the
14:26:30 fifth one is sort of the operative one for this particular
14:26:34 motion.
14:26:34 And we contend that those new infringement
14:26:38 theories were not authorized by the Court's August 2020
14:26:41 order. Bucket number two are claim limitations for which
14:26:46 we contend that Fintiv has not provided sufficient

14:26:49 infringement contentions, and that insufficiency has now
14:26:53 carried forward into the infringement expert report that
14:26:57 we've now received since we filed this motion.
14:27:00 So regardless of which bucket of information
14:27:03 you're looking at in these contentions, we think the right
14:27:07 result in both buckets is to strike the either
14:27:11 unauthorized or insufficient infringement theories that
14:27:14 are in this fifth set of infringement contentions.
14:27:21 So I'm going to take bucket number one first.
14:27:23 And as I sort of got into the papers, I realized, and I
14:27:27 think I'm right, that what this really comes down to is,
14:27:29 what did your Honor order that the parties could do in
14:27:33 that August 2020 hearing? And so, I just read the record
14:27:38 cold, and I came to a conclusion that I think our position
14:27:41 is the correct one, and that is, we interpreted and
14:27:47 interpret your August 2020 order as ordering a limited set
14:27:51 of supplementation that would be related to the new
14:27:54 products that you authorized them to bring into the case.
14:27:57 That is, the iPads and Macs, number one. And number two,
14:28:03 that they would be permitted to provide infringement
14:28:06 contentions that relate to the new Markman terms that you
14:28:10 were going to construe, based on the fact that those new
14:28:13 products were coming in. And those terms, as you'll
14:28:17 recall, were contactless, mobile device and registering
14:28:21 the mobile wallet application. So those were the three

14:28:24 terms that you thereafter construed.

14:28:27 On the other hand, it seems -- it appears to me
14:28:31 that Fintiv takes the position that your August 5th, 2020
14:28:35 order gave them essentially free rein to add any theories
14:28:39 they wanted, based on a statement you made at the hearing
14:28:41 that they would be permitted to, and I'll quote, provide
14:28:45 any additional infringement contentions it believes are
14:28:49 appropriate, end quote.

14:28:51 Now, of course, I wasn't at that hearing. I
14:28:53 wasn't involved in this case, but I did pick up the skill
14:28:56 of reading in the last couple of years. And so, I read
14:29:00 that transcript very carefully. And I further went
14:29:03 forward and read every single word that has come out of
14:29:09 your Honor's mouth since the date of that hearing. So all
14:29:11 of the other hearings, including the subsequent Markman
14:29:13 hearings, to sort of discern for myself what we think that
14:29:18 you intended to permit.

14:29:20 And one thing you said at that hearing, that
14:29:24 August 5th hearing was, and I'll quote again, that the
14:29:27 issues being addressed were, quote, really more about
14:29:31 including additional products under the same theories, end
14:29:35 quote. And you also said that you -- if you were going to
14:29:38 allow the additional products in, that you would offset
14:29:41 that in any way I can to make sure that Apple is
14:29:45 protected.

14:29:45 You also gave, I believe it was, Mr. Waldrop the
14:29:49 opportunity to suggest anything to the Court about what
14:29:52 you were proposing, and the answer to that question was
14:29:55 no. And so, when we left the hearing -- and I've spoken
14:29:59 to co-counsel and I've spoken to Mr. Ravel -- we believed
14:30:03 it was very clear that there would be a limited set of
14:30:06 supplementation, based on the new products obviously. And
14:30:09 we don't have any quarrel with the infringement
14:30:12 contentions, based on iPads and Macs, although, you know,
14:30:15 obviously we didn't like the result of that. We don't
14:30:18 have any quarrel with those infringement contentions. And
14:30:23 then, infringement contentions that were specifically
14:30:24 related to the new terms that were going to be construed.
14:30:28 So, as I said, I didn't stop reading with that
14:30:31 transcript. I went forward and read some of the other
14:30:34 things that your Honor has said. And in the October 21
14:30:40 Markman hearing, there's a further colloquy where you say,
14:30:43 the Court is going to allow the plaintiff to amend its
14:30:46 infringement contentions now that it has this
14:30:49 construction. And that was the construction of mobile
14:30:53 device. And the defendant will be allowed to amend their
14:30:54 invalidity contentions in the same sequence that always
14:30:57 occurs now that I've amended this. And that's on page 42
14:31:00 of that transcript.
14:31:01 And then, Mr. Jensen came back in just a few

14:31:06 minutes later and sought clarification where he asks: We
14:31:11 understand your Honor's guidance here to refer to an
14:31:14 opportunity for Fintiv to amend its infringement
14:31:18 contentions solely with respect to the issues relating to
14:31:21 this particular claim term, the mobile device. This is
14:31:25 not an opportunity for them to redo and add new theories
14:31:30 to their existing contentions, based on other claim
14:31:33 limitations, et cetera, end quote. Your response, that's
14:31:38 correct. Mr. Jensen says, is that correct? The Court
14:31:41 says yes, sir.
14:31:41 So when I read that all as a package -- and, you
14:31:46 know, again, I'm giving it a cold read. I wasn't at these
14:31:49 hearings. I believe that your August 2020 order -- and
14:31:54 you're obviously the arbiter of what you intended to
14:31:57 order. I believe your August 2020 order was quite clear
14:32:00 that the new contentions were going to be related to iPads
14:32:04 and Macs or related to these three new claim
14:32:08 constructions, and that's all.
14:32:10 Now, that's not what we have here. We have quite
14:32:13 a number of new contentions that are unrelated to iPads
14:32:17 and Macs. In fact, they're related to the products that
14:32:21 have been in this case since day one and unrelated to the
14:32:24 three new claim constructions that your Honor gave. And
14:32:28 we've listed those new theories on page 4 of our opening
14:32:32 brief. And I won't list them in my argument because

they're there. I will make the point, though, that these new theories that we've listed on page 4 of our opening brief don't have anything to do with the three terms that were thereafter briefed, contactless, mobile device and registering.

And I am going to try and do one thing, your Honor, that I might screw up. I'm going to show you an exhibit that we've provided your Honor. And I didn't have any role in preparing this, but I think it's a really nice -- can you see this, your Honor?

THE COURT: (Indicating affirmatively.)

MR. CUNNINGHAM: So this is Exhibit 12 to our opening brief. And I get to be gushy about this because I had no role in preparing this. But what it does is, it sets forth the infringement contentions, the fifth set, and for everything that we contend is new, it's highlighted in yellow. And for the things that we contend are insufficient, we've highlighted in pink. And so, it's a -- really, for me, getting up to speed, it was a really easy guide to determine, you know, what it was that we were contending was new and what it was we were contending is insufficient.

And so, I have one example of something that we contend is new here. And this is a doctrine of equivalents argument that's based on the claim term

14:33:52 "displaying a contactless card applet." Now, the word
14:33:57 "contactless" appears in what I just read you, your Honor,
14:34:01 obviously. But the point of the argument being made here,
14:34:05 the contention being made here is about the word
14:34:08 "displaying." And you can read that right here. Any
14:34:12 difference between presenting a virtual card and
14:34:14 displaying a contactless card applet is insubstantial.
14:34:17 So this is not a contention about your
14:34:23 construction of contactless; rather, it's a contention
14:34:25 about what is or -- what does or does not display that
14:34:31 card applet? And so, this theory could have been in the
14:34:34 first set of contentions. It could have been in the
14:34:36 second set of contentions. It could have been in the
14:34:38 third or the fourth, but it doesn't belong in a set of
14:34:41 contentions that were issued nine months after the final
14:34:46 contentions were due in this case.
14:34:48 And besides, obviously these are doctrine of
14:34:52 equivalents opinions for the most part. There are at
14:34:56 least three of these that are doctrine of equivalents
14:35:00 arguments. And the plaintiff knew from day one that they
14:35:02 would need to allege DOE if that was going to be the path
14:35:05 they chose. And so, what we think is not in dispute, your
14:35:10 Honor, is that all of the things in Exhibit 12 that are
14:35:14 set forth in yellow are new opinions, new contentions that
14:35:19 were issued to Apple about nine months after the deadline

14:35:23 for final contentions.

14:35:25 Number two, that Fintiv did not seek leave to add
14:35:29 these particular theories. What they sought leave to add
14:35:32 was theories related to iPads and Macs and theories
14:35:36 related to the specific claim terms that your Honor was
14:35:39 going to construe thereafter. And again, as to those two
14:35:42 buckets of contentions, we do not -- this motion is not
14:35:46 about those. We don't have a quarrel with those today.
14:35:49 And then, three, it's undisputed that the deadline for
14:35:51 final contentions was in January of 2020.

14:35:55 So I kind of go back to your OGP, your Honor, and
14:35:59 I know there's some folks on this Zoom call that had
14:36:03 perhaps some role in developing the OGP and the rules
14:36:07 surrounding that. And I won't name any names, but the
14:36:11 rules are there for a reason. The rules say if you're
14:36:14 going to try and amend your contentions after the final
14:36:17 deadline, you gotta ask me, you gotta get leave.

14:36:20 And the purpose for that, your Honor, if I can be
14:36:22 so bold as to say is to avoid the kind of chaos that we
14:36:26 have here where we're having this hearing. I've got
14:36:29 rebuttal reports due next Thursday. We've got summary
14:36:33 judgment motions coming up in June, and we're seeing new
14:36:37 theories coming in months and months after the final
14:36:40 deadline.

14:36:41 And so, the rules mean something, and I think

14:36:45 they mean that these new theories -- if your Honor agrees
14:36:48 with me about what you intended to order the parties to do
14:36:51 and not do in August, if you agree with me, I think the
14:36:54 yellow-highlighted theories need to come out of the
14:36:58 contentions, and then, I think we can meet and confer with
14:37:00 the other side about also removing these new theories from
14:37:04 the expert report that we got.
14:37:07 So, your Honor, for bucket number two, the key
14:37:12 question here is, is Apple as of the final contention date
14:37:17 on fair notice of what Fintiv will point to at trial, at
14:37:21 trial as satisfying certain claim limitations, and the
14:37:26 answer again from my cold read is no. We've raised three
14:37:30 claim terms in this part of our motion, "widget," "rule
14:37:33 engine" and "storing and managing the mobile wallet
14:37:36 application on a server." And for each of those, we don't
14:37:41 have a contention from Fintiv as of the final contention
14:37:46 date, and even as of the date of these later contentions
14:37:50 in September of 2020, as to what parts of the products
14:37:56 actually satisfy those three contentions.
14:37:59 And the expert report, your Honor, by the way,
14:38:00 doesn't solve these problems. In fact, I think we'll be
14:38:04 talking to you later on in this case about how the expert
14:38:07 report in many ways makes the problems worse.
14:38:10 And so, if I can just start with "widget," and
14:38:13 then, I'll move through the other two relatively quickly.

14:38:16 The Court obviously remembers that the construction of
14:38:19 that term "widget" is software that is either an
14:38:22 application or works with an application. And your Honor
14:38:27 explained in your Markman hearing, which I've also read,
14:38:30 that a person of ordinary skill in the art would not
14:38:33 understand that a widget is a standalone application but,
14:38:36 rather, as code, e.g., a plug-in that runs within an
14:38:41 application.
14:38:42 And so, we needed to know, your Honor, what code
14:38:49 that runs in an application is the claimed widget. That
14:38:54 is what would have put us on notice of their infringement
14:38:57 contention with respect to this term. And I submit to
14:39:01 your Honor that if you study the pink portions of the
14:39:08 Exhibit 12 that we've submitted to your Honor on the claim
14:39:12 term "widget," you will not see reference to anything that
14:39:17 can be fairly characterized as code that runs within an
14:39:20 application.
14:39:21 And I'm going to just get to that in -- right
14:39:25 now. So this is where widget begins. On information and
14:39:39 belief, et cetera, et cetera, and then, there's a series
14:39:41 of citations you see here, your Honor, on the first page
14:39:44 of their contentions regarding widget. We have gone
14:39:47 through and confirmed that all of the documents you see
14:39:50 cited here and all of the support pages and all of the
14:39:53 deposition testimony don't make reference to a single line

14:39:57 of code, of executable logic code.

14:40:00 So now we go to the examples that they give for
14:40:05 what a widget is. A widget and a wallet management
14:40:12 applet, WMA, corresponding to the contactless card applet
14:40:15 are retrieved as illustrated in the screen shots below.
14:40:19 And then, what we see are images of credit cards. And
14:40:22 this, by the way, your Honor, for the record, is Exhibit
14:40:25 12 at page 48. And again, the accused pair, a widget, as
14:40:32 illustrated in the screen shots below, we see images.
14:40:35 Well, obviously, your Honor, images aren't code, nor are
14:40:41 the data files that are cited later on in these
14:40:43 contentions, nor are the card art images that are cited
14:40:48 later on.

14:40:49 And if you look closely at the briefing, it's
14:40:55 always expressed in -- that saying various things are with
14:40:59 respect to a widget or for a widget, and that language is
14:41:03 there for a reason because they're not telling us what the
14:41:07 widget is. They're telling us what things are with
14:41:09 respect to the widget or for the widget. But you will
14:41:14 search their brief. And I'm talking about page 7 of their
14:41:17 proposition brief, in vain, for any statement that says
14:41:19 this software code, this file, this set of source code
14:41:24 functions, these lines of code, these are the -- this is
14:41:28 the claimed widget, it just isn't there, your Honor.

14:41:32 And in my view, the notice requirement of

14:41:36 infringement contentions, at a very minimum, required them
14:41:39 to say that. And we may have a disagreement about what it
14:41:42 is or is not, but we need to know what it is that
14:41:46 satisfies the Court's construction that they allege is the
14:41:49 widget. And it's not in the contentions, and, frankly,
14:41:52 your Honor, it's not in the briefing either. And it's
14:41:54 certainly not in the expert report.
14:41:56 So the question I have is, when am I going to see
14:41:59 it for the first time? Am I going to see it for the first
14:42:02 time in a deposition of the expert? Am I going to see it
14:42:04 for the first time in response to a summary judgment
14:42:07 motion? Or worse yet, am I going to see it for the first
14:42:10 time when their expert takes the stand at trial?
14:42:13 And so, you know, we cited the Rapid Completions
14:42:17 case out of the Eastern District of Texas in our briefing.
14:42:20 And in that case, Judge Mitchell found that quoting
14:42:24 diagrams and screen shots from the products does not put a
14:42:29 defendant on notice of where the plaintiff believes the
14:42:31 asserted elements are found in an instrumentality, which
14:42:34 is the exact information that plaintiff is supposed to be
14:42:38 revealing in its infringement contentions.
14:42:39 And she found in that case that it was
14:42:43 particularly true because the only additional explanatory
14:42:46 text is conclusory and merely parrots the claim language.
14:42:53 And so, we're in an untenable position here, your Honor,

14:42:55 where we're left -- we're guessing what we think they
14:42:58 might eventually point to, but it's far too late for them
14:43:01 now to point to something that actually constitutes
14:43:05 executable logic code that runs inside one of these
14:43:10 applications, and we just don't have that.
14:43:13 And so, I think at this point, your Honor, I want
14:43:17 to wrap up and say, you know, where does this leave us?
14:43:20 Where does this leave us? You know, we can't have
14:43:23 something new come out of the expert's mouth in a
14:43:26 deposition. We can't have something new come out at
14:43:28 trial. We needed to know this information as of last
14:43:31 January. We needed to know what they think the widget is,
14:43:34 what they think the rule engine is, and what they think
14:43:36 manages and stores these things, and we simply don't have
14:43:40 it in these contentions. And, frankly, we don't have it
14:43:42 in the expert report either.
14:43:48 And so, your Honor, I think I'm just going to
14:43:50 stop right there and ask if you have any questions, and if
14:43:53 not, I will turn it over to opposing counsel.
14:43:56 THE COURT: Mr. Waldrop.
14:43:58 MR. WALDROP: Thank you, your Honor. I do have
14:44:02 slides, your Honor. So if you'll permit me to share my
14:44:05 screen, your Honor.
14:44:14 So may it please the Court again, I'm John
14:44:23 Waldrop on behalf of the plaintiff of this case, your

14:44:25 Honor.

14:44:26 Apple's motion to strike should be denied. This
14:44:30 is a case that turns on the answers to three important
14:44:33 questions, your Honor. First, did the Court's August 5th,
14:44:39 2020 order directing Fintiv to provide, and I quote, any
14:44:43 additional infringement contentions it believes are
14:44:45 appropriate, provide sufficient leave to permit Fintiv to
14:44:50 serve amended infringement contentions on September 11,
14:44:53 2020? The answer to this question is yes.

14:44:57 Second, your Honor, was Fintiv permitted to serve
14:45:03 amended contentions on September 11, 2020, after the
14:45:05 Court's supplemental claim construction hearing on August
14:45:09 28th, 2020, requested by Apple, per the Court's standing
14:45:15 rules and specifically the agreed-upon order in this case?
14:45:19 The answer to that question, your Honor, is yes.

14:45:22 Finally, your Honor, has Fintiv shown under the
14:45:25 relevant four-factor test that it was appropriate to serve
14:45:29 amended infringement contentions on September 11 in this
14:45:33 case? And finally, the answer to that question is yes.
14:45:37 As such, your Honor, Apple's motion to strike Fintiv's
14:45:41 infringement contentions should be denied.

14:45:43 And unless the Court has specific questions, I
14:45:47 was going to lay out and take up each of these questions
14:45:51 in turn and lay out as to somewhat of my confusion and
14:45:56 bafflement that we're here. But before I do that, your

14:45:58 Honor, I wanted to give the Court an opportunity to ask me
14:46:01 whatever questions. And if you have none, your Honor,
14:46:07 I'll go forward.
14:46:08 THE COURT: I have none.
14:46:10 MR. WALDROP: First, your Honor, the first
14:46:15 question which sets the table here is, was the Court's
14:46:18 August 5th, 2020 order sufficient? And on slide 2, your
14:46:21 Honor, I set forth an overview of our argument. One, we
14:46:27 were authorized to do this on 9-11, your Honor, and I'll
14:46:30 get back to why we believe that's the case. Two, your
14:46:33 Honor, Apple fails to rebut any of the four-factor
14:46:36 analysis regarding the 9-11 infringement contentions. And
14:46:41 then, finally, your Honor, there's no prejudice from the
14:46:43 September 11 infringement contention, your Honor.
14:46:45 And I appreciate and I'm happy that Mr.
14:46:49 Cunningham's in the case, but the idea that this is new
14:46:53 and that there's some prejudicial issue after eight
14:46:55 months, your Honor, there's no prejudice. And in fact,
14:46:58 Apple has responded to these, what they call, new
14:47:02 infringement theories in its interrogatory responses
14:47:05 regarding non-infringement. So this has been debated and
14:47:09 followed for quite some time, your Honor.
14:47:11 So as you may recall, your Honor -- I'll stop
14:47:14 there.
14:47:14 THE COURT: Mr. Waldrop, let me interrupt you for

14:47:16 a second.

14:47:19 Mr. Cunningham, when did you -- when did Apple
14:47:23 receive the infringement contentions that you were
14:47:26 discussing today?

14:47:28 MR. CUNNINGHAM: I believe it's accurately set
14:47:31 forth on that slide. It was September 11 or thereabouts
14:47:35 of 2020.

14:47:36 THE COURT: Okay.

14:47:40 MR. WALDROP: So if I can continue, your Honor.

14:47:43 As you may recall -- and I'd like to go to slide
14:47:46 4, your Honor. As you may recall, Fintiv has certainly
14:47:50 and diligently worked for leave to amend its infringement
14:47:53 contentions per the Court's orders -- and I'll come back
14:47:56 to that -- and we did so on July 1st, 2020. And we did
14:48:00 this, your Honor, not because we think we needed to, but
14:48:03 we did so in the belief to address Apple's complaints
14:48:07 throughout the case about needing additional detail in our
14:48:11 infringement contentions and mostly to avoid motion
14:48:15 practice.

14:48:15 So we worked pretty fastidiously, your Honor, to
14:48:19 meet these complaints throughout the entire case. Apple's
14:48:23 complaints, your, Honor, were more focused on the how and
14:48:25 not the what regarding infringement, which we believe was
14:48:29 a matter for expert discovery but is an attempt to later
14:48:35 say we added detail upon detail. And I'm glad that Mr.

14:48:38 Cunningham showed you some of those infringement
14:48:39 contentions because, your Honor, they cite tons of
14:48:42 evidence. They are fulsome, your Honor. They are not
14:48:46 skeletal. There is documents and source code for every
14:48:50 single element.
14:48:50 Now, after receiving our amended infringement
14:48:55 contentions, your Honor, on July 1st, 2020, Apple
14:48:58 requested additional claim construction on a number of
14:49:02 counts. The Court then set a supplemental claim
14:49:05 construction date for August 28th, 2020. So on August
14:49:12 5th, the Court set a hearing on supplemental claim
14:49:14 construction. The record is clear from Fintiv's
14:49:20 perspective that the Court's August 5th, 2020 order
14:49:24 directing Fintiv to provide any additional infringement
14:49:28 contentions that Fintiv believes were appropriate was
14:49:30 exactly that, and that's what exactly Fintiv did on
14:49:33 September 11, 2020.
14:49:35 In fact, your Honor, we took that as an order to
14:49:38 us to make sure all issues were presented to the Court in
14:49:43 connection with claim construction and so that we could
14:49:45 resolve all of this at that time, your Honor. I would
14:49:49 like to direct the Court -- let me stop for a second
14:49:52 there, your Honor.
14:49:53 Now, thereafter, I want to make -- note that on
14:49:55 the timeline, your Honor, fact discovery closed on

14:49:58 December 18, 2020. And the close of expert discovery is
14:50:01 within a several weeks, May 24, 2021. And as counsel's
14:50:08 argument presented, they already have our infringement
14:50:09 report and our damages report. And, your Honor, it wasn't
14:50:12 like Apple was not amending its invalidity contentions
14:50:15 after September 11th, and they did so throughout the case.
14:50:20 Both parties diligently tried to address each's concerns
14:50:23 regarding what they considered was in the case and what
14:50:25 wasn't in the case.
14:50:28 Now, in its motion, your Honor -- so let me stop
14:50:33 there, your Honor. I want to direct the Court to slide 6.
14:50:39 Now, no one disputes that the Court ordered this and
14:50:41 that's what happened. And from my perspective, this
14:50:44 should be the end of that inquiry and Apple's motion
14:50:47 should be denied. But what Apple is arguing is that any
14:50:50 such amendment to the infringement contentions by Fintiv,
14:50:53 ordered by this court, should be limited to the issues
14:50:56 surrounding the supplemental claim construction that Apple
14:50:59 requested from the Court.
14:51:01 And, your Honor, on slide 6, I'm setting forth
14:51:05 the Court's instruction an order on August 5th, 2020,
14:51:09 setting the September 11 date for Fintiv's amended
14:51:13 infringement contentions did not only relate to new
14:51:16 products or iPads or Macs, even claim constructions. And
14:51:20 in fact, I represented -- I presented to you in bullet

14:51:24 two, exactly what the Court said: Any additional
14:51:27 infringement contention it believes are appropriate.
14:51:29 On the third bullet, your Honor, you had already
14:51:33 granted the addition of the iPads and Macs into the case,
14:51:37 which we had not received discovery of, you had granted
14:51:40 that on the bench on August 5th, 2020. Apple's argument
14:51:45 that the September 11 order doesn't relate to iPads and
14:51:49 Macs doesn't jibe with exactly what this court said. And
14:51:51 I understand opposing counsel wasn't there, but I just
14:51:53 wanted to set the record complete on that, your Honor.
14:51:57 So this additional argument that opposing counsel
14:52:00 has raised leads to the second question, which was, was
14:52:04 Fintiv permitted to serve amended infringement contentions
14:52:07 on September 11, 2020, after the Court's supplemental
14:52:11 claim construction hearing on August 28th? Now, I would
14:52:16 like to direct the Court to slide 7.
14:52:19 Now, I understand that counsel was not --
14:52:22 opposing counsel was not in the case, and this was agreed
14:52:24 to by different counsel. But what I've put forth to the
14:52:28 Court on slide 7 is an excerpt from the agreed amendment
14:52:33 -- order governing proceedings in patent cases. So this
14:52:36 is your current order, your Honor. And then, the footnote
14:52:39 from the agreed scheduling order between the parties. So
14:52:41 this is what Fintiv and Apple both agreed.
14:52:44 And, your Honor, you are clear that the parties

14:52:49 should seasonably amend preliminary infringement
14:52:52 contentions when a party believes that its contentions
14:52:55 should be supplemented. That is set forth on footnote one
14:52:58 in our agreed scheduling order. It specifically says the
14:53:01 parties may amend preliminary infringement contentions and
14:53:04 preliminary invalidity contentions without leave of court
14:53:06 so long as counsel certifies that it undertook reasonable
14:53:10 efforts to prepare its preliminary contentions and the
14:53:13 amendment's based on material identified after those
14:53:15 preliminary contentions were served.
14:53:16 That is exactly what we have done, your Honor,
14:53:19 through every single amendment to the contentions in this
14:53:24 case. We got access to discovery, we amended our
14:53:29 infringement contentions. As you may recall, deposition
14:53:31 and source code access was limited for about five months
14:53:34 as a result of COVID. We weren't even able to go to
14:53:36 opposing counsel's offices to review source code for many
14:53:39 months. Depositions did not start until about May or
14:53:43 June. And so, your Honor, as soon as we got information,
14:53:45 we immediately started updating it per the agreed
14:53:48 scheduling order in this case on footnote one.
14:53:51 Now, your order governing proceedings, your
14:53:54 Honor, which also provides -- said that the deadline for
14:53:58 serving final infringement and invalidity contentions --
14:54:01 says that the deadline for serving final infringement

14:54:05 contentions doesn't relieve the parties of their
14:54:08 obligation to seasonably amend if new identified
14:54:11 information is identified after initial contentions.
14:54:13 So this is the order governing proceedings which
14:54:16 came after the agreed order in our case. And so, at all
14:54:20 times, we have complied. And it makes sense, your Honor,
14:54:23 because the way this court thankfully does case scheduling
14:54:27 is, the parties do claim construction first, fact
14:54:31 discovery comes later. And so, in that regime, as the
14:54:33 Court wisely has done, the Court allows for the parties to
14:54:37 adjust their infringement contentions as the case
14:54:41 develops.
14:54:41 Unlike in other jurisdictions where both fact and
14:54:44 claim construction proceedings are ongoing concurrently,
14:54:47 here, the plaintiff is given leeway by the Court and is
14:54:52 directed to update the infringement contentions as the
14:54:54 case progresses. So there's nothing complicated here,
14:54:58 your Honor. And what we did, we thought was consistent
14:55:01 with the agreed scheduling order and consistent with what
14:55:03 the Court expects, and that's exactly they way we acted
14:55:08 here.
14:55:08 So after the Court's August 28th, 2020 hearing,
14:55:12 which was a claim construction hearing, which the Court
14:55:15 allows for parties to update in their infringement and
14:55:19 invalidity contentions as a matter of course, eight weeks

14:55:21 after Markman, the Court set a truncated date of two
14:55:25 weeks, and that's exactly what we did.
14:55:28 Now, in its motion, Apple identifies a number of
14:55:31 issues, many of which are moot, your Honor. And there was
14:55:35 one slide where counsel for -- opposing counsel presented
14:55:41 something that he wanted stricken, your Honor. That's not
14:55:43 -- it's been mooted. It's not even in the expert report.
14:55:46 And so, this gets to the count of artificiality of this
14:55:49 proceeding given that the infringement contentions have
14:55:53 been in the case since September 11. There's been
14:55:55 discovery responses from both parties on these issues.
14:55:58 And now there's an infringement report that serves as the
14:56:01 basis for our infringement positions in this case, and
14:56:05 he's presenting to you an argument that's not even being
14:56:08 advanced by our expert; so it's mooted.
14:56:12 And so, I would like to then point the Court to
14:56:14 slide 3 just to give a little bit more context for this,
14:56:18 your Honor. And what's on slide 3 is a summary of the six
14:56:23 items that were in Apple's original briefing of issues
14:56:26 that they had with the infringement contentions. And most
14:56:29 of these have been mooted and are not even being advanced,
14:56:33 your Honor, in our expert reports by our expert.
14:56:35 And so, what is -- they're not an issue. So
14:56:38 essentially there's two-and-a-half issues for the Court's
14:56:40 consideration which are partially mooted because we have

14:56:45 -- we're not advancing those theories in the case. So,
14:56:49 your Honor, on slide 5, your Honor, we have three issues
14:56:56 that counsel -- opposing counsel spent some time on
14:57:01 regarding the defectiveness of our infringement
14:57:03 contentions, your Honor.
14:57:04 Once again, going to the how and not the what,
14:57:07 your Honor, which we think is inappropriate for
14:57:09 contentions. And, your Honor, it's clear there and my
14:57:12 point is proven exactly from their own language, if you
14:57:17 look at the second bullet, which is taken directly from
14:57:20 their brief -- and by the way, this is all mooted, your
14:57:22 Honor, because it's already in the expert report.
14:57:24 But they say in the second bullet, "the amended
14:57:27 final contentions also fail to disclose how Fintiv
14:57:31 believes Apple servers store." Your Honor, that's why you
14:57:35 have expert reports. Infringement contentions are not for
14:57:37 the how. You know, your Honor, and that is the basis for
14:57:40 this entire motion is really a summary judgment motion.
14:57:43 It is really the attempt to get expert discovery which
14:57:46 they already have and will get as the case proceeds.
14:57:49 So, your Honor, I just want to highlight that for
14:57:51 you that they're telling the Court it's not what they
14:57:56 we're concerned about, we really want to know the how.
14:57:58 And as we all know, your Honor, that's not the purpose of
14:58:02 infringement contentions, your Honor.

14:58:04 If I could go to slides 8 and 10, your Honor. I
14:58:09 just wanted to talk to you briefly about the third
14:58:13 question, which we believe the answer is yes is, has
14:58:16 Fintiv shown that the relevant four-factor test that it
14:58:20 was appropriate to serve amended infringement contentions
14:58:23 in this case, and we think that answer is yes.
14:58:25 Now, to set the table for this a little bit, your
14:58:29 Honor, is during the supplemental claim construction
14:58:34 process, after that, there were three things that were
14:58:36 added regarding the claim terms that were argued over.
14:58:40 And this is the selecting the contactless card applet.
14:58:43 That was construed by the Court on slide 8. So we amended
14:58:47 our infringement contentions to address this, which was
14:58:49 specifically discussed at the supplemental claim
14:58:53 construction hearing.
14:58:54 On slide 9, your Honor, we also -- the Court
14:58:58 considered the registering element, which was -- we added
14:59:01 literal and DOE further supplementation regarding this.
14:59:07 This term was construed by the Court to have its plain and
14:59:10 ordinary meaning, so we updated our infringement
14:59:11 contentions to address that. So this is -- these are
14:59:14 things specifically discussed by the Court during that
14:59:16 supplemental claim construction, we addressed and would
14:59:19 have had the right to do so in other claim construction
14:59:23 process.

14:59:24 On slide 10, your Honor, we provided a exemplary
14:59:29 quote from Apple's arguments from the August 28, 2020
14:59:33 Markman hearing regarding the registering term. So here,
14:59:36 your Honor, we're giving you language that they argued at
14:59:40 claim construction -- supplemental claim construction
14:59:42 regarding this term, and they made multiple statements
14:59:45 about what registering was. And they said registering one
14:59:48 of those things is not the same thing as registering the
14:59:50 other. They make all of these arguments.
14:59:52 And so, your Honor, we were fully within our
14:59:54 rights, your Honor, to -- and the Court would have
14:59:56 expected us to update our infringement contentions to
14:59:59 address multiple arguments that were set forth, which I
15:00:02 won't get into now, your Honor, because experts are going
15:00:04 to resolve that. But I put that for the Court's
15:00:07 edification on slide 10 so that the Court is aware of
15:00:11 Apple's arguments regarding this and what was going on,
15:00:15 your Honor.
15:00:17 And then, as to the widget, your Honor -- and
15:00:22 I'll get to the widget later, your Honor. I'll come back
15:00:24 to the widget argument because that was discussed
15:00:28 fulsomely in our claim construction -- I mean, in our
15:00:31 infringement contentions, your Honor.
15:00:32 So the next point, your Honor, which leads to the
15:00:35 four-factor test, which was not addressed by Apple at all,

15:00:39 on slide 11, I provide a summary of these arguments that
15:00:43 Apple argues that Fintiv did not seek leave, but as you
15:00:46 know, your Honor, the Court, on August 5th, directed us to
15:00:50 amend, and we thought it was appropriate to put all issues
15:00:52 before the Court given the fact that there was an upcoming
15:00:55 claim construction hearing.
15:00:56 And the four-factor test on a motion to strike,
15:01:00 it's essentially the same four-factor test for a motion
15:01:02 for leave to amend the infringement contentions. And
15:01:06 after considering all of this evidence and the four
15:01:08 factors, your Honor, it was completely appropriate for
15:01:11 Fintiv to amend its infringement contentions, your Honor.
15:01:14 Briefly, your Honor, we have slides that go to
15:01:18 each of the factors. On slide 12, factor one, reason for
15:01:22 delay. As I indicated before, your Honor, most of Apple's
15:01:25 technical witness depositions took place after July 1st,
15:01:29 2020. And so, we updated our infringement contentions to
15:01:33 put that -- put Apple on notice of that deposition
15:01:36 testimony and documents. Moreover, your Honor, we quickly
15:01:42 updated our infringement contentions after the August 5th
15:01:46 date. So on September 11, they had that information.
15:01:49 Almost eight months ago. Disallowing this amendment, your
15:01:52 Honor, we think, is contrary to the rules of civil
15:01:54 procedure and discovery, your Honor.
15:01:57 Going to slide 13, your Honor, and here, I'm just

15:02:01 simply doing for the Court's edification what we were
15:02:03 doing. So literally on slide 13, I'm showing you that we
15:02:07 are updating -- this is the complaint Apple has regarding
15:02:11 one of what they called a new theory. What we did in the
15:02:14 update was to provide exemplary new evidence. So we cite
15:02:19 to the deposition testimony of Christopher Sharp, which
15:02:22 would further elucidate what we thought was regarding the
15:02:26 claim, the wallet management applet.
15:02:30 We then put forward -- we cited deposition
15:02:32 testimony of Mr. Fruhauf, which we recently obtained on
15:02:37 August 5th. We cited all of this in the September 11,
15:02:40 2020 claim charts for the iPhone and iWatches on pages 58
15:02:44 248 and 291.
15:02:48 On slide 14, your Honor, this is the complaint
15:02:51 where they say this is a new literal and DOE theory. Your
15:02:53 Honor, that we updated in the September 11th infringement
15:02:56 contentions was to cite to additional testimony from Mr.
15:02:59 Sharp which we think showed how this element table -- what
15:03:02 this contention went to and specifically how it infringed,
15:03:07 your Honor.
15:03:08 On slide 15, your Honor, we give more evidence of
15:03:13 how, once again, what we supplemented. We just added
15:03:17 additional evidence supporting the theory, which had
15:03:19 already been set forth in the infringement contentions on
15:03:22 July 1st. So we've added additional information.

15:03:30 And then, that leads to the second factor, your
15:03:32 Honor, which is the importance of what the Court would be
15:03:35 excluding and the availability of lesser sanctions.
15:03:39 Fintiv's amendment, your Honor, is important to this
15:03:41 litigation because, one, it was done in response to
15:03:43 Apple's request to update our infringement contentions,
15:03:46 which they did so throughout the entire case. They've
15:03:48 never been satisfied, even though we have diligently
15:03:51 moved, I think, five or six times to avoid motion practice
15:03:55 and to present all relevant evidence to support our expert
15:03:57 case. And Apple hasn't even addressed this factor in its
15:04:03 briefing.
15:04:03 On slide 17 briefly, your Honor, we talk about
15:04:05 the danger of unfair prejudice. There is no unfair
15:04:08 prejudice in this case, your Honor. The September 11
15:04:11 amendment has been in the case for at least almost eight
15:04:15 months, your Honor. What's more, the case schedule and
15:04:18 the trial date had been extended several times to address,
15:04:21 one, Apple's supplemental claim construction and, also,
15:04:25 the amendment of new products to the case. So there's no
15:04:28 prejudice. They've had the amendment, they have the
15:04:31 benefit of expert discovery in terms of expert reports.
15:04:35 And they're going to depose our expert in multiple weeks,
15:04:38 in a few weeks. And they're going to have an opportunity
15:04:39 to complain about whether or not our motion for summary

15:04:43 judgment, or whatever, whether or not we've met our
15:04:46 burden. We think we have.
15:04:48 Slide 18, your Honor, we get to the fourth
15:04:50 factor, which is the availability of a continuance. There
15:04:54 shouldn't be a continuance. This case has been extended
15:04:56 multiple times through no fault of anyone's but the
15:05:01 pandemic and the attempts to make sure the case was
15:05:04 developed fulsomely. But fact discovery has been closed
15:05:08 since December 18. Expert discovery will be closed on May
15:05:11 24, 2021. And the entire case schedule is set with a
15:05:16 trial hopefully, God willing, on October 4, 2021, and
15:05:20 there's no need for a continuance. Apple doesn't address
15:05:23 this at all.
15:05:23 Now, I'll stop here, your Honor, because the next
15:05:30 several slides really go to Apple's attempt to have expert
15:05:36 discovery through their infringement contentions or a
15:05:38 motion for summary judgment on a motion to strike, which
15:05:40 is inappropriate. But we have slides to address the
15:05:43 sufficiency of our contentions, your Honor, which I'm
15:05:46 actually very proud of our contentions and the amount of
15:05:48 work that have been put in when you compare them to other
15:05:52 infringement contentions in other cases. I think they are
15:05:55 a model of fulsomeness and a model of diligence, your
15:05:55 Honor.
15:05:58 But I want to stop there before I get into the

15:06:01 details on that to make sure I answered the three
15:06:03 questions that I thought were most salient that I've asked
15:06:07 that before I get to the details about the sufficiency of
15:06:10 the infringement contentions, your Honor.
15:06:14 THE COURT: So you're good, Mr. Waldrop?
15:06:18 MR. WALDROP: And so, I also wanted to add, your
15:06:20 Honor, I think our infringement contention is like 300
15:06:22 pages, your Honor. Just to give the Court a size and
15:06:24 scope of what we'll talk about. We have 300 pages of
15:06:29 infringement contentions in this case. I mean, this was
15:06:32 not shoddy work. There was a lot of hours and I'm very
15:06:36 proud of the people who worked on it.
15:06:38 So I want to address this in four slides of the
15:06:43 hearing regarding the sufficiency of our 300 pages of
15:06:46 infringement contentions. The insufficiency issue, we
15:06:49 believe, is mooted now, your Honor, because the expert
15:06:51 reports are in the case. And regardless of what Mr.
15:06:55 Cunningham may think about them, the Court will resolve
15:06:57 them, the expert has addressed them, and there will be
15:07:00 further proceedings where we'll discuss that. But all of
15:07:04 these three issues that are set forth in Apple's briefing
15:07:07 about the widget, regarding the storing and managing the
15:07:12 mobile wallet application, and regarding the rule engine,
15:07:14 all of those things, with no disrespect to him, have
15:07:17 already been addressed in the expert report that they have

15:07:22 been -- they've had for over a month now.

15:07:24 Now, on slides 20, your Honor, in any event,
15:07:28 these infringement theories and contentions were disclosed
15:07:32 at least as of the September 11 infringement contentions,
15:07:35 and Apple's been on fair notice of them for many months.
15:07:38 And in fact, Apple provided non-infringement arguments and
15:07:42 responses regarding these very same three theories that he
15:07:45 claims or opposing counsel claims are defective in a
15:07:49 response to an interrogatory later in the case.

15:07:50 So I think they've conceded that they understand
15:07:53 at least something about what they mean, because they were
15:07:55 able to respond to these theories in interrogatory
15:07:58 responses that we took to heart and have based our
15:08:02 infringement reports on their responses. So we believe
15:08:05 that they have some understanding of what is in our
15:08:10 infringement contentions as it relates to these three
15:08:12 arguments.

15:08:13 Moreover, your Honor, on slide 21, Apple's whole
15:08:17 issue about the widget, your Honor, goes to disagreements
15:08:20 about factual accuracy and legal correctness. As this
15:08:24 court is well aware, disagreement with the factual
15:08:27 accuracy or the legal correctness, they have no bearing on
15:08:30 the sufficiency of infringement contentions. And that's
15:08:33 what I heard counsel to be arguing and that's not the
15:08:36 point of infringement contentions.

15:08:38 In fact, your Honor, with respect to the widget, they talk about that there's no software there. And Apple's essentially disagreeing with our interpretation of what a widget is as well as their own technical documents. And that will be decided at trial and that will be decided by the Court. But that disagreement does not render Fintiv's infringement contentions to be sufficient.

In fact, as this court knows, the Federal Circuit in CI Ventures says disagreement with a plaintiff's interpretation of the claims does not make its infringement contention insufficient. And that's what I heard from opposing counsel, and that is not the law, and that is not what is required for my infringement contention.

On slide 22, your Honor, you know, we talk about the other element, which is storing and managing the mobile wallet application. Once again, this is Apple's disagreement about what we consider to be the interpretation of their technical documents, which we provide a long list of supporting our argument. And this fully illustrates that Apple, we believe, has a different conception of the requirements in infringement contentions. They serve a notice function and are not a forum for debating in terms of deciding our whole case. And in fact, your Honor, in SSL, cited in our briefing,

15:09:50 that the disagreement over this correctness doesn't impact
15:09:54 the infringement contentions, that this is something to be
15:09:56 resolved in expert discovery.
15:09:57 So Apple's complaints really amounts to
15:10:01 substantive disagreements about infringement, not about
15:10:03 the sufficiency of our infringement contentions, and their
15:10:07 motion should be denied.
15:10:11 Finally, your Honor, as to the rule engine,
15:10:13 because he brought the rule engine up, and I just want to
15:10:16 make sure we address this. We provide specific citations
15:10:18 to documents with pincites, source code modules, quoted
15:10:22 passages, deposition testimony, and Apple's still
15:10:25 nitpicking and they're demanding that the rule engine has
15:10:28 to be, you know, many more details about this. Well, we
15:10:30 have an expert report, so they have that. So Mr.
15:10:32 Cunningham can read that.
15:10:35 But what Apple is really demanding, and has been
15:10:38 demanding throughout the case, is that we prove our
15:10:40 infringement case and our infringement contentions before
15:10:43 there's ever an expert report. And as the Court knows, in
15:10:47 ROY-G-BIV Corp, which, is in the Eastern District of
15:10:51 Texas, the scope of the infringement contention and expert
15:10:53 reports are not, however, coextensive. Infringement
15:10:55 contentions need not disclose specific evidence nor do
15:10:59 they require a plaintiff to prove its infringement case.

15:11:01 And what I heard from opposing counsel, even though I know
15:11:05 he's new in the case, is he wants me to prove my case
15:11:07 today, and that's not how this case is structured and
15:11:14 that's not what the rules require.
15:11:15 And then, that's the last slide on that, your
15:11:17 Honor. But -- and I apologize to the Court for having to
15:11:22 do that, but I thought it was important that the Court
15:11:24 understood that there's 300 pages of infringement
15:11:28 contentions. You know, 300 pages of infringement
15:11:31 contention served on September 11. Numerous documents.
15:11:33 And in fact, your Honor, all of this was done, in
15:11:39 fact, in the context of Apple's request for supplemental
15:11:41 claim construction. And these were agreed upon between
15:11:45 the parties before the Court's order that it -- order
15:11:48 governing patent proceedings whereby the parties committed
15:11:51 to update their infringement contentions with new evidence
15:11:55 and validity contentions. This is not new. I mean, this
15:11:59 is not a surprise. This is something the parties agree
15:12:01 to.
15:12:01 So with that, your Honor, I'll stop now. I just
15:12:04 wanted to make sure we laid out our case. And I'm,
15:12:08 frankly, surprised by this motion, your Honor, and that we
15:12:10 having to defend it. But, your Honor, I'm here to stop
15:12:12 now and talk about any questions that you may have.
15:12:17 THE COURT: I'm good.

15:12:19 Mr. Cunningham.

15:12:22 MR. CUNNINGHAM: Thank you, your Honor.

15:12:25 I have, I think, three and only three points in rebuttal. One is -- patent one is, we heard a lot of talk about whether the September contentions were authorized, and that is not the issue, your Honor. The issue is what the Court authorized to be in those September contentions.

15:12:46 And I think we've got the better side of the argument that the what was a limited set of supplementation, not a free-for-all, that was ordered by the Court in August and then, talked again -- talked about again in October. And so, the what that we're seeking to strike is precisely what's in -- shaded in yellow in Exhibit 12 to our motion. So that's the what.

15:13:14 And I didn't hear a whole lot about those particular things being new or not new. What I heard was a new argument that -- and this is my second point, your Honor, that now, the newness of those is mooted by the fact that time has passed and we now have an expert report. That is not how this works, your Honor. That is not how this works.

15:13:42 So I, plaintiff, blew a deadline, added new theories without leave under the Court's rules, but since time has passed and I've now issued an expert report that contains those same new theories, I somehow get a pass for

15:13:59 blowing the deadline and violating the rules. That is not
15:14:01 how this works. I don't hear any citation to any
15:14:05 precedence -- precedent that that's how this works.
15:14:08 And so, this whole mootness argument is kind of
15:14:11 stunning to me that we just get a pass because now we've
15:14:14 advanced a few months and we have an expert report that
15:14:17 parrots the same --
15:14:18 THE COURT: Well, it's not -- Mr. Cunningham,
15:14:20 it's not -- in fairness, it's not a couple of months.
15:14:27 It's almost eight months.
15:14:29 MR. CUNNINGHAM: I agree, your Honor. And we
15:14:30 filed this motion --
15:14:31 THE COURT: The one -- other judges, not me, but
15:14:34 other judges might wonder, you know, we have a brand-new
15:14:38 batch of lawyers representing Apple, and others might, you
15:14:44 know, wonder why this wasn't done a lot sooner.
15:14:47 MR. CUNNINGHAM: Well, your Honor --
15:14:48 THE COURT: I'm not wondering, but I think others
15:14:50 judges might. And might take from the fact that there's
15:14:55 been a wholesale replacement of lawyers that maybe things
15:15:02 weren't getting done that should have been done six or
15:15:04 seven months ago.
15:15:06 MR. CUNNINGHAM: Well, your Honor, I think at
15:15:08 that point --
15:15:08 THE COURT: Certainly prior to the expert

15:15:09 reports. If you had issues with the infringement
15:15:12 contention, I'm not sure why they weren't raised before
15:15:15 the expert reports.
15:15:17 MR. CUNNINGHAM: Well, your Honor, in fact, they
15:15:19 were. So this motion was filed in October, October 16 of
15:15:22 2020. We did not receive the expert report until last
15:15:26 month, is my understanding.
15:15:27 THE COURT: Okay.
15:15:28 MR. CUNNINGHAM: And so, I view both the time
15:15:31 period in which the violation of the rules arose and the
15:15:36 time period for which prejudice oughta be measured as
15:15:39 October, when the motion was filed.
15:15:41 THE COURT: Okay.
15:15:41 MR. CUNNINGHAM: And so, you know, I don't
15:15:43 quarrel with the fact that it took a few months to get to
15:15:45 a hearing on this motion and a decision, but the passage
15:15:49 of time is -- can't be held against Apple. We were prompt
15:15:53 in filing the motion once we got these unauthorized new
15:15:57 contentions. So I think that -- I hope your Honor will
15:16:01 take that point with the respect that I provided to you,
15:16:04 but that's --
15:16:04 THE COURT: I do.
15:16:05 MR. CUNNINGHAM: That's the point. And so -- and
15:16:08 then, I heard a statement about your Honor's rules. And
15:16:11 you are the arbiter of what your rules mean. This is my

15:16:14 third and final point where your OGP says after the
15:16:20 deadline for final infringement and invalidity
15:16:23 contentions, leave of court is required for any amendment
15:16:26 to infringement or invalidity contentions. And then,
15:16:28 there was a quote in the slides -- in slide 7 to counsel's
15:16:32 argument that quotes that next sentence. This deadline
15:16:35 does not relieve the parties of their obligation to
15:16:38 seasonably amend if new information is identified after
15:16:41 initial contentions.
15:16:43 Now, I'm happy to be corrected on this, but I've
15:16:46 always read that, that statement as being you can't wait
15:16:52 until the final contentions to spring new theories on
15:16:55 people if you know about them before that. Not that you
15:16:58 can wait until after the deadline for infringement
15:17:02 contentions, come up with new theories and then, put those
15:17:07 in contentions without leave.
15:17:09 So I read the rule very, very differently than
15:17:11 counsel just read it. And so, those are my points. I
15:17:16 leave you with that. And I'll leave you with just one
15:17:20 final observation, and that is, we did not hear one word
15:17:22 about the actual code that might be the widget that is
15:17:27 claimed in the patents that would meet your Honor's claim
15:17:30 construction. This is not a summary judgment argument.
15:17:32 It may be come June, but right now, it's about an issue of
15:17:36 fundamental notice. That's all I have, your Honor.

15:17:39 THE COURT: And maybe it got lost in there, but
15:17:41 was there any citation to code in the expert reports?
15:17:47 MR. WALDROP: (Moving head up and down.)
15:17:50 MR. CUNNINGHAM: In the expert report itself, the
15:17:52 citations are to the same information that is in the
15:17:54 contentions, I believe. I have not --
15:17:57 THE COURT: Well, let me -- I will be very
15:18:00 curious to know and maybe you all need to get back to me.
15:18:04 I'd be very curious to know whether or not the issues that
15:18:07 you're concerned about just with regard to deficiencies,
15:18:10 the second bucket, whether any of that information that
15:18:14 you're concerned with was provided in the expert reports.
15:18:18 MR. CUNNINGHAM: With regard to these three claim
15:18:20 limitations, your Honor, my understanding is -- and I --
15:18:23 you know, I'm in the midst of pulling apart the expert
15:18:27 reports. So it may be something I do need to get back to
15:18:29 you on. But my understanding is that they have -- that
15:18:31 Fintiv has effectively picked up the contentions -- what
15:18:35 we say are the insufficient contentions and dropped those
15:18:38 contentions into the expert reports, relatively unchanged.
15:18:43 So the issues that we have with the contentions with
15:18:44 respect to those three claim limitations carry forward
15:18:48 into the expert report.
15:18:49 THE COURT: Well, Mr. Cunningham, let me assume
15:18:53 for a second you're right. I'm going to let Mr. Waldrop.

15:18:58 I certainly understand, I think, and can pretty clearly
15:19:03 delineate the issue with what was added. I mean, that --
15:19:08 in terms of deficiencies in infringement contentions where
15:19:13 there's now an expert report, I'm probably more
15:19:18 sympathetic to, you know, the infringement contentions
15:19:21 have probably been -- that's yesterday, what's in the
15:19:25 expert report because you've been given that.
15:19:28 Now, to that extent, for better or worse, the
15:19:32 plaintiff is limited by what is in the expert report. And
15:19:37 if you think that there is insufficient evidence in the
15:19:43 expert report, then I would feel much more comfortable
15:19:49 dealing with that on a motion for summary judgment basis
15:19:52 or a Daubert basis, either one, than I am in trying to
15:19:59 ferret out what was missing in the infringement
15:20:02 contention. But it's been cured in the expert report.
15:20:09 So I'm going to -- I'm not going to voice
15:20:12 anything on -- with respect to the issue of what was added
15:20:17 that should not have been without amendment. But I am
15:20:22 going to deny what was deficient in the infringement
15:20:25 contentions and without prejudice to Apple raising that in
15:20:30 the context of what is now extant in the expert reports.
15:20:37 It would take -- I'm not -- A, I'm not sure really what
15:20:44 the law is in terms of the experts, you know, if the
15:20:47 experts come in and they fix it, so to speak, in the
15:20:52 expert reports, you know, you're probably on notice. So

15:20:54 I'm leaving that aside. The other, I get.

15:20:56 So do you have anything else you wanted to add
15:20:58 only with respect to the issue of what you believe Fintiv
15:21:02 added without permission?

15:21:04 MR. CUNNINGHAM: Just one question, your Honor,
15:21:07 and that is.

15:21:07 THE COURT: Yes, sir.

15:21:08 MR. CUNNINGHAM: If we hear -- is we have the
15:21:11 expert report and I understand your ruling with regard to
15:21:14 that, and it makes sense to me. But if we hear for the
15:21:16 first time new information in a deposition or in a
15:21:20 declaration opposing our summary judgment motion or
15:21:24 trial --

15:21:24 THE COURT: That won't happen.

15:21:26 MR. CUNNINGHAM: We're going to be permitted to
15:21:28 raise that again, correct?

15:21:29 THE COURT: No. That -- Mr. Waldrop has been in
15:21:32 front of me, Mr. Ravel has been in front of me in trial.
15:21:35 I don't know that Mr. Guaragna has yet. You don't get to
15:21:39 amend your answers. Experts don't get to amend or
15:21:44 supplement at depositions. Now, they could certainly
15:21:48 explain something that may or may not be clear, but they
15:21:50 don't get to -- they don't get to say, oh, let me add to
15:21:57 that.

15:21:59 MR. CUNNINGHAM: Okay.

15:21:59 THE COURT: So they are limited within reason to the four corners of their expert reports. And so, that's why I'm saying with regard to what's missing in infringement contentions, we now have a new deed, so to speak, with the metes and bounds of what the plaintiff can say, and that's what they're going to be limited to.

15:22:21 MR. CUNNINGHAM: And the expert report is a closed report effectively.

15:22:24 THE COURT: Expert report is closed now -- yes.

15:22:26 MR. CUNNINGHAM: Okay.

15:22:27 THE COURT: Now, the plaintiff may be doing a rebuttal report and if you point out in your rebuttal -- in your rebuttal report to them that it's missing X and they may be able to say no, in the record, here is where X is, that would certainly be possible. But no one gets to expand the record of what is available.

15:22:53 MR. CUNNINGHAM: All right. Thank you, your Honor. I understand.

15:22:56 THE COURT: Okay. And I think Mr. Ravel will tell you and Mr. Waldrop will tell you, I'm pretty strict on that at trial.

15:23:04 MR. WALDROP: (Moving head up and down.)

15:23:04 THE COURT: So I think the expert reports are pretty important. And I think anyone else will tell you, also, that I take motions for summary judgment and Daubert

15:23:13 motions pretty seriously, as well.

15:23:15 MR. CUNNINGHAM: I understand.

15:23:16 THE COURT: And so, that's just -- I feel more
15:23:20 solid ground dealing with it at that phase.

15:23:23 MR. CUNNINGHAM: Understand, your Honor. Thank
15:23:24 you.

15:23:24 THE COURT: Mr. Waldrop, is there anything you
15:23:25 wanted to add on the -- just in -- I don't think you need
15:23:30 to, but you're welcome to. I mean, I'm not -- you don't
15:23:34 need to. I'm just saying, if there's anything additional
15:23:38 because I'm about to have to jump on another call. If
15:23:40 there's anything you feel like we haven't covered, I'd
15:23:42 like to hear it.

15:23:43 MR. WALDROP: No, your Honor. Only just that,
15:23:45 you know, I always admit when I break the rules and don't
15:23:48 follow rules, your Honor. We never thought we were not
15:23:51 following the rules, your Honor, there was a violation.
15:23:53 We believe that we were complying with the Court's rule
15:23:55 and it came up in the hearing, and we were trying to be as
15:23:58 complete as possible to get all of the issues resolved in
15:24:00 front of the Court. That's all I can say about that, your
15:24:02 Honor.

15:24:02 And I appreciate the opportunity. It's always
15:24:04 great to see you. It's always great to argue against
15:24:07 great opposing counsel. So thank you for everything, your

15:24:09 Honor.

15:24:09 THE COURT: Anything else, counsel?

15:24:12 MR. CUNNINGHAM: Nothing for Apple, your Honor.

15:24:13 Thank you.

15:24:14 THE COURT: We'll get an order out as quickly as

15:24:16 possible. But I would assume it will come out pretty

15:24:20 shortly after I talk to my law clerks.

15:24:21 Anything else we need to take up in this case?

15:24:28 MR. RAVEL: Thank you, Judge. Enjoy your

15:24:30 six-minute break.

15:24:31 MR. WALDROP: Thank you, your Honor.

15:24:33 THE COURT: I've got six minutes to do anything I

15:24:35 want.

15:24:35 MR. WALDROP: Enjoy, sir. Enjoy.

15:24:37 THE COURT: Thank you. Take care, guys.

15:24:40 MR. CUNNINGHAM: Take care.

(Proceedings concluded.)

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UNITED STATES DISTRICT COURT)
WESTERN DISTRICT OF TEXAS)

I, LILY I. REZNIK, Certified Realtime Reporter, Registered Merit Reporter, in my capacity as Official Court Reporter of the United States District Court, Western District of Texas, do certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

WITNESS MY OFFICIAL HAND this the 15th day of June, 2021.

/s/Lily I. Reznik
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